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In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Douglas M. Costle, Administrator of the United States Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 586 F.2d 650.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1978. The government's petition for rehearing with suggestion of rehearing en banc was denied on November 24, 1978. By order dated February 12, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to March 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), in requiring the Environmental Protection Agency to provide "opportunity for public hearing" prior to any issuance, denial, or modification of a discharge permit, requires EPA to conduct adjudicatory hearings before taking action on such permits where, after due notice of the proposed action, no one requests a hearing before the action is taken and a request made subsequently raises no material issue of fact.

STATEMENT

1. The Federal Clean Water Act (also known as the Federal Water Pollution Control Act), 33 U.S.C. 1251 *et seq.*, establishes "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1). Section 301(a) of the Act, 33 U.S.C. 1311(a), makes unlawful the discharge of any pollutant into the navigable waters of the United States, the contiguous zone, or the ocean,[1] except in compliance with the

[1] See the definitions in Section 502(7), (8), (9), (10), and (12) of the Act, 33 U.S.C. 1362(7), (8), (9), (10), and (12).

specific requirements of the Act. Such compliance may be achieved by obtaining a permit issued by the Administrator under Section 402 of the Act, 33 U.S.C. 1342.

Section 402 establishes the National Pollutant Discharge Elimination System (NPDES). Section 402(a)(1) authorizes the Administrator, "after opportunity for public hearing," to issue a permit for the discharge of any pollutant, on the condition, among others, that the discharge will meet the requirements of Section 301(b), 33 U.S.C. 1311(b). At all times material to this case, Section 301(b)(1)(B) required that no later than July 1, 1977, "publicly owned treatment works" meet "effluent limitations based upon secondary treatment" and defined by the Administrator.[2]

EPA has promulgated regulations (40 C.F.R. Part 125) implementing the "opportunity for public hearing" required by Section 402(a)(1). The regulations provide for three basic steps. First, public notice is given of EPA's proposed issuance, denial, or modification of a permit. 40 C.F.R. 125.32. Second, if EPA's regional administrator finds that there is "a significant degree of public interest" in the proposed

[2] In 1977, Congress amended the Act to permit the Administrator to grant extensions of this deadline through, but no later than, July 1, 1983. Pub. L. No. 95-217, Section 56(c), 91 Stat. 1593. Section 45, 91 Stat. 1584 (33 U.S.C. 1311(i)). The amendment also permits the Administrator to modify the effluent limitations of Section 1311(a)(1)(B) with respect to discharges by publicly owned treatment works into marine waters. Section 44, 91 Stat. 1584 (33 U.S.C. 1311(h)).

action, he must hold a public hearing of the "legislative" type (at which any interested person may submit oral or written statements or data). 40 C.F.R. 125.34. Third, after that hearing, if one is held (or, if not, after the notice), the administrator must determine what action to take with respect to the proposed permit. 40 C.F.R. 125.35. Within ten days after this determination, any interested person may request an adjudicatory hearing with respect to any "material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." 40 C.F.R. 125.36(b), (c). A request for an adjudicatory hearing must state with particularity the reasons for the request and the issues proposed to be considered. 40 C.F.R. 125.36(b)(2). Any interested person may also request legal rulings by EPA's General Counsel with respect to the proposed action. 40 C.F.R. 125.36(m). Within 90 days after EPA makes a final determination, any interested person may obtain judicial review in the appropriate court of appeals of the Administrator's issuance, denial, or modification of a permit. 33 U.S.C. 1369(b)(1). Otherwise, the terms and conditions of the permit are not subject to judicial review. 33 U.S.C. 1369(b)(2).

2. In November 1974, EPA issued to respondent City of Los Angeles a permit to discharge treated sewage from the city's Hyperion treatment plant into the Pacific Ocean.[3] EPA published notice of its

[3] Since 1960, sewage from Los Angeles has been processed at the Hyperion Wastewater Treatment Plant in Los Angeles and discharged into the Pacific Ocean. Most of the sewage has received only primary treatment. About one-third of the sewage has received additional secondary treatment. The metals and other solids removed during treatment, called "sludge," have been pumped through a seven-mile outfall pipe and discharged into the Pacific Ocean. The treated sewage has been discharged into the ocean through a five-mile outfall. A one-mile outfall has been used only in emergencies (see App. A, *infra*, 3a-4a).

Section 402(b) provides that the responsibility for issuing NPDES permits for discharges into navigable waters may be assumed by a state if it has an approved program, as California does. See generally *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202-209 (1976). A federal permit is still required for discharges more than three miles from the coastline. Therefore, EPA permits are required for Hyperion's discharges through its five- and seven-mile outfalls. The California Water Quality Control Board also requires a state permit for these outfalls under a state water pollution statute. Cal. Water Code § 13260 (West 1971).

intent to issue the permit, provided an opportunity to submit written comments, and held a public hearing on its proposed action (App. A, *infra*, 4a). Neither the City of Los Angeles nor any other respondent filed written comments on the proposed permit or voiced objections at the public hearing. No one requested an adjudicatory hearing.

On August 18, 1975, EPA rescinded the 1974 permit and issued a new permit with a compliance schedule that gradually reduced the amount of sewage sludge which could be discharged from the Hyperion plant.[4] Once again, EPA published advance public

[4] The 1975 permit set target dates for eliminating the sludge in three phases: (a) elimination of no less than one-third of the sludge by April 1, 1977; (b) elimination of no less than an additional one-third by October 1, 1977, and (c) termination of the discharge of sludge by April 1978 (A.R. Exh. 1 at

notice of its tentative determination to revise the permit and held a hearing on the proposed revisions (See A.R. Exh. 1 at 4).[5] Once again, none of the respondents presented either written or oral objections to the new permit or requested an adjudicatory hearing. No one sought judicial review of EPA's issuance of this permit, and 90 days thereafter, its terms and conditions were no longer subject to judicial review. 33 U.S.C. 1369(b)(2).

3. On April 26, 1977, EPA advised the City of Los Angeles that EPA proposed to modify the 1975 permit by extending its expiration date to December 17, 1979, without otherwise disturbing its terms and conditions (A.R. Exh. 9-10).[6] Public notice of EPA's proposed action, including an invitation to submit

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10, 16; see note 5, *infra*). This schedule would have resulted in compliance with Section 301 effluent limitations and Section 403 ocean-discharge criteria.

[5] "A.R." refers to the administrative record certified to the court of appeals by EPA pursuant to Rule 17 of the Federal Rules of Appellate Procedure. This record includes the 1975 permit and materials pertaining to the time extensions made in 1976 and 1977. The evidentiary materials relied on in 1975 in establishing the compliance schedule are part of a separate administrative record not certified to the court of appeals. In the court of appeals, the record was supplemented to include the materials reproduced in Appendices B-E, *infra*. These materials include Mr. Kilroy's request for an adjudicatory hearing, his brief in support of that request and EPA's responses.

[6] Permits may be issued for any period up to five years. 33 U.S.C. 1342(b)(1)(B). The 1975 permit originally had an expiration date of February 1, 1977. On application by the City of Los Angeles for an extension, on January 24, 1977, EPA extended the permit to June 30, 1977 (A.R. Exh. 7).

comments and to request a hearing, was published in the Los Angeles Times, April 27, 1977 (A.R. Exh. 12).[7] Neither respondents nor anyone else filed written comments or requested a hearing, and no hearing was held (App. A, *infra*, 6a). On June 2, 1977, EPA issued a final determination to extend the permit (A.R. Exh. 15).

On June 13, 1977, respondent John B. Kilroy, Sr., represented by attorneys for respondent Pacific Legal Foundation (PLF), filed a "request for an adjudicatory hearing pursuant to 40 C.F.R. Section 125.36" (App. B, *infra*). Pacific Legal Foundation is a public-interest law firm located in Sacramento, California (PLF Pet. For Review at 1-2). Mr. Kilroy is a resident of the Los Angeles area (*id.* at 2). The present proceedings is the second of three proceedings PLF has brought against EPA regarding sludge disposal by the City of Los Angeles wherein it has sought to prevent the City of Los Angeles from using a landfill, located in Palos Verdes, for the disposal of sludge (*id.* at 3).[8] In the present case, the

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[7] In addition to requiring EPA to publish its notice in a newspaper of general circulation, 40 C.F.R. 125.32(a) permits any person to request in advance that EPA send him individual notice of any proposed action within a designated state or geographical area. Respondents made no such request for individual notice of proposed actions concerning the Hyperion plant. The City of Los Angeles, as the permittee, received an individual notice. The other respondents received no notice other than the published notice (A.R. Exh. 12).

[8] The first lawsuit unsuccessfully sought to enjoin EPA from funding the landfill project on the theory, among others, that no environmental impact statement was prepared by EPA with respect to its decision to fund the project. EPA volun-

hearing request was filed only by Kilroy. None of the other respondents—PLF, the City of Los Angeles, and the City of Torrance—made such a request. Kilroy's request automatically stayed the effectiveness of the permit modification pending disposition of the request. See 40 C.F.R. 125.35(d)(2).

The regional administrator determined that Kilroy's request raised only issues of law, which he certified to the EPA General Counsel in accordance with 40 C.F.R. 125.36(m). See App. C, *infra*, 29a-30a.[9] Kilroy then submitted a brief to the General Counsel in support of his argument that the permit modification was defective as a matter of law (App. D, *infra*, 31a-41a). His brief did not contend that he

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tarily agreed, however, to prepare such a statement. *Pacific Legal Foundation* v. *Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977), appeal pending, No. 77-3844 (9th Cir.). PLF's most recent complaint is pending in the district court in Los Angeles. *PLF* v. *Andrus*, No. 78-3463 (C.D. Cal.). It alleges, among other things, that diversion of sludge from the ocean to the landfill, allegedly due to the sludge-out schedule in the 1975 permit, violates the Endangered Species Act, 16 U.S.C. 1536, because gray whales feed on plankton, which feeds on the sludge; because brown pelicans feed on anchovies, which feed on plankton, which feed on the sludge; and because trucks going to and from the landfill kill the El Segundo Butterfly.

[9] The request stated (App. C, *infra*, 26a) that the "issues to be raised" at the adjudicatory hearing would be (1) "whether the requirements of the permit should be modified in that the project that is the subject of the compliance schedule set forth in the NPDES permit[ ] is being evaluated in an EIS and [whether] the compliance schedule should not be mandated until the EIS is completed," and (2) "whether the procedures used and the record developed were adequate [to issue] an NPDES permit."

desired to raise anything other than the following issues of law (App. D, *infra*, 31a-32a):

1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and

2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1281, *et seq.* [10]

The General Counsel ruled (App. E, *infra*) that EPA may extend the expiration date of a permit through a modification. Section 301 permits may be issued for terms up to five years. So long as the

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[10] The brief made four arguments (App. D, *infra*, 33a-41a): (1) EPA has no authority to extend the expiration date of a permit because it is authorized only to issue a new permit, (2) although the Act permits "modifications," a time extension is not a "modification," (3) the action taken by the regional administrator therefore was the issuance of a new permit, and (4) the permit contained a sludge-out schedule that was then under evaluation in an environmental impact statement in connection with the funding of the landfill, and no decision on the schedule should be made pending completion of the environmental impact statement.

total duration of the extended permit does not exceed five years, she reasoned, a modification may include a time extension. The General Counsel also held that the fact that an environmental impact statement was being prepared in connection with the funding of the landfill project did not preclude extension of the permit. The Act expressly provides that EPA's actions on permits are exempt from NEPA. 33 U.S.C. 1371(c).

4. A petition for review of the Administrator's action was filed in the court of appeals by PFL, Kilroy, and the City of Torrance (No. 77-2909). A similar petition was filed by the City of Los Angeles (No. 77-3008), and the petitions were consolidated.

The court of appeals did not question that EPA had complied with its notice-and-hearing regulations (see App. A, *infra*, 4a-7a). The court did not take issue with EPA's interpretation of Kilroy's hearing request as raising only legal issues, or with the ruling of EPA's General Counsel rejecting Kilroy's legal arguments (see *id.* at 7a).

Nonetheless, the court held that EPA had denied petitioners an "opportunity for public hearing" within the meaning of Section 402(a)(1) (App. A, *infra*, 16a-22a). The court held that EPA, before it may issue, revoke, or modify an NPDES permit, generally must hold an adjudicatory hearing, even when no one has requested one. For EPA to escape this general rule in a particular case, "[i]t must be shown that the

material facts supporting the decision are not subject to dispute" (*id.* at 19a) and that a hearing would be "futile" and would serve "absolutely no purpose" (*id.* at 20a). The court acknowledged that "this is a not inconsiderable burden to place on the agency," but considered it "appropriate in view of the strong policy in favor of holding public hearings before an adjudicative decision is made" (*id.* at 19a-20a).

The court suggested that there were certain facts "that may be disputed and with respect to which the record in this case is silent" that would affect the reasonableness of the compliance schedule in the extended permit (*id.* at 20a). The court said it could "conclude unequivocally neither that the parties have no dispute about these matters nor that they do" (*id.* at 21a). Consequently the court was "unable to deny an adjudicatory hearing on the ground that none of the material facts upon which the EPA's decision rests are disputed" (*ibid.*). In remanding the proceeding to the Administrator "to conduct such a hearing" (*id.* at 21a), the court did not limit the remand to the factual issues it had suggested. Pending the disposition of the case on remand, the court continued its stay of the compliance schedule embodied in the extended NPDES permit for the Hyperion plant.[11]

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[11] The court also continued its stay (by orders dated December 23, 1977, and March 29, 1978) of EPA's separate enforcement action against the City of Los Angeles for alleged violations of that schedule. *United States* v. *City of Los Angeles*, No. 77-3047HP (C.D. Cal., filed Aug. 12, 1977).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals that EPA must hold an adjudicatory hearing before taking action on an NPDES permit whenever there are issues of material fact that "may be disputed," regardless of whether anyone has requested such a hearing, is contrary to the express language of Section 402(a)(1) and to decisions of this Court. The decision places an intolerable burden on the operations of EPA—and of state agencies as well—in administering the NPDES system.

1. Section 402(a)(1) requires the Administrator to provide an "opportunity for public hearing" before taking action on an NPDES permit. A statutory "opportunity" for a hearing is an opportunity; it does not require a hearing in every instance. *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39-44 (1964); *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Ass'n*, 356 U.S. 282, 287 (1958); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). Nor does it preclude an agency from establishing reasonable prerequisites for granting a hearing, and "barring at the threshold those who [do not] measure up to them." *FPC* v. *Texaco, Inc.*, *supra*, 377 U.S. at 39; see also *Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 620-621 (1973); *United States* v. *Storer Broadcasting Co.*, *supra*, 351 U.S. at 205.

A requirement such as that provided in 40 C.F.R. 125.36(b) and (c), *supra*, requiring that interested persons submit a request for a hearing and set forth the material issues of facts involved, is a reasonable prerequisite. Federal agencies need not conduct an adjudicatory hearing when no disputed issues of fact have been raised. *FPC* v. *Texaco, Inc.*, *supra*; *United States* v. *Storer Broadcasting Co.*, *supra*; *United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971); *Dyestuffs and Chemicals, Inc.* v. *Flemming*, 271 F.2d 281, 286-287 (8th Cir. 1959), cert. denied, 362 U.S. 911 (1960); *Sun Oil Co.* v. *FPC*, 256 F.2d 233, 240-241 (5th Cir.), cert. denied, 358 U.S. 872 (1958).

The decision of the court of appeals conflicts in particular with this Court's decision in *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 397-398 (1976). The statute involved there, Section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(a)(3), provides (423 U.S. at 397):

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted * * *.

The mine operators in *Kleppe*, who had not requested a hearing, argued in this Court for "the

same type of formal findings of fact that are the usual product of the adversary hearing to which they have an absolute right, but which was waived by failure to make a request" (*ibid.*). In unanimously rejecting the argument, the Court stated (*id.* at 398):

> Section 109(a)(3) provides the mine operators with no more than "an opportunity" for a hearing. The word "opportunity" would be meaningless if the statute contemplated formal adjudicated findings whether or not a requested evidentiary hearing is held.
>
> * * * * *
>
> We therefore agree with the Court of Appeals that the language of the statute, especially when read in light of its legislative history, requires the Secretary to make formal findings of fact specified in § 109(a)(3) only when the mine operator requests a hearing. The requirement for a formal hearing under § 109(a)(3) is keyed to a request, and the requirement for formal findings is keyed to the same request.

So, here, where Section 402(a)(1) similarly provides no more than an "opportunity for public hearing," the hearing requirement "is keyed to a request." The power to compel a hearing by receiving notice and requesting a hearing, with a statement of the material issues of fact, constitutes the "opportunity" that the statute provides. The right to a hearing is waived by failure to request one.

Accordingly, since in this case no one requested a hearing in response to EPA's published notice of its

proposed action,[12] and even after that action no one requested a hearing to resolve issues of fact, no hearing on factual issues was required. The court of appeals erred in ruling otherwise. Indeed, the court should have limited its review of EPA's action to those issues that had been properly presented to the Agency, and thus should have determined only whether EPA correctly resolved the legal questions that Kilroy had raised.[13]

In holding that the "opportunity for public hearing" in Section 402(a)(1) need not be "keyed to a request," the court of appeals read the word "opportunity" out of the Act. Its decision will, in practice, require EPA routinely to hold adjudicatory hearings on NPDES permit actions, even where

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[12] EPA's notice-and-hearing regulations, as mentioned above (note 7, *supra*), give any person or organization the right to request in advance that EPA mail them individual notice concerning any matter. 40 C.F.R. 125.32(a). Respondents made no such request. Persons who choose not to make such a request must rely on newspaper notice. *Ibid.*

[13] Since the court of appeals did not question the validity of the notice procedure followed by EPA (40 C.F.R. 125.36), and since PLF, the City of Los Angeles, and the City of Torrance had presented no objections concerning the permit extension to the Agency, their petitions for review should have been dismissed. *McGee* v. *United States*, 402 U.S. 479 (1971); *Save the Bay, Inc.* v. *Administrator of EPA*, 556 F.2d 1282, 1289 (5th Cir.), reh'g en banc denied, 560 F.2d 1023 (1977). Kilroy did object to the proposed action before the Agency, but only on two legal grounds. The only question properly preserved by Kilroy for judicial review, therefore, was the validity of EPA's determinations of these two issues. *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499-500 (1955); *McGee* v. *United States, supra; Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).

no one requests a hearing and even where the proposed action is, for example, only a time extension of a permit whose conditions have been fully considered at previous "legislative" hearings.[14] For if EPA holds no adjudicatory hearing, all a complainant need do in order to set aside the Agency's action, under the court's decision, is to suggest plausibly in the court of appeals that some members of the public might disagree concerning factual matters implicated by the Agency's action. Compare *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).

2. The court's acknowledgement that its decision places "a not inconsiderable burden" (App. A, *infra*, 19a-20a) on EPA is an understatement. In the next three years, EPA must reissue or extend an estimated 7,200 NPDES permits—600 of them within the Ninth Circuit.[15] In *United States Steel Corp.* v. *Train*, 556 F.2d 822, 834 n.14 (7th Cir. 1977), the Seventh Circuit noted that of more than 42,000 dischargers who had applied for NPDES permits, a "relatively small percentage of cases"—"about 2,000"—had involved requests for adjudicatory hearings. The court observed that if EPA were required to conduct an adjudicatory hearing on "a substantial proportion" of permit proceedings, "the entire permit program would have become hopelessly

[14] A public hearing of that type was held in 1975 on the terms and conditions of the permit at issue here. See pages 5-6, *supra*.

[15] These figures do not encompass an estimated 20,000 dischargers who are required to obtain NPDES permits but have not yet been issued one.

bogged down before the agency * * *." *Id.* at 834 n.14; see also *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132-133 (1977).[16]

Moreover, it is not only EPA's permit proceedings, but also proceedings conducted by state agencies under the NPDES program, that will be affected by the court's decision. Under Section 402(b)(3) of the Act, 33 U.S.C. 1342(b)(3), a state which administers an approved NPDES program must

> insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and * * * provide *an opportunity for public hearing* before a ruling on each such application. [Emphasis added.]

Since the italicized language is the same as the language in Section 402(a)(1) that was construed by the court of appeals, the court's decision apparently means that state agencies administering NPDES programs will be under the same burden the court has imposed on EPA.

[16] In this case and in *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (1978), the Ninth Circuit has held that the "hearing" referred to in Section 402 must comply with the full panoply of procedural rights provided by the Administrative Procedure Act, 5 U.S.C. 554, 556-557 (see App. A, *infra*, 17a). If, however, EPA regulations implementing the hearing requirement of Section 402 are valid, as we contend, an adjudicatory hearing need only be held upon a request which presents material issues of fact. 40 C.F.R. 125.36(b), (c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-2909

PACIFIC LEGAL FOUNDATION, a nonprofit California corporation; JOHN B. KILROY, SR.; and CITY OF TORRANCE, a municipal corporation, PETITIONERS

vs.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

No. 77-3008

THE CITY OF LOS ANGELES,
a municipal corporation, PETITIONER

vs.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

Before: MERRILL and SNEED, Circuit Judges, and EAST,* District Judge.

[Aug. 9, 1978]

SNEED, Circuit Judge:

This case presents a challenge to the Environmental Protection Agency's (EPA) action in extending the

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* Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

terms of the National Pollutant Discharge Elimination System (NPDES) permit applicable to the Hyperion Wastewater Treatment Plant in Los Angeles for an additional two and one-half years. Petitioner City of Los Angeles argues that the State of California, not the EPA, has jurisdiction over the discharges in question and that the joint permitting procedure used by the state and the EPA is not authorized by the statute. Petitioner Pacific Legal Foundation (PLF) initially questions EPA authority to extend the expiration date of an NPDES permit PLF also argues that the extension process was procedurally inadequate because no hearing was held and that the Administrator's action in extending the permit was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. We have carefully considered these challenges, but must reject most of them. We do, however, remand this proceeding to the Administrator for an adjudicatory hearing as required by the Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556 and 557, with respect to EPA's extension of the NPDES permit.

I.

Background

A. Statutory Framework.

The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq., (FWPCA) provides that the discharge of any pollutant shall be unlawful except as in compliance with the specific

requirements of the act. Section 301, 33 U.S.C. § 1311. The statute also specifically provides that obtaining an NPDES permit authorizes such discharge. Section 402, 33 U.S.C. § 1342. The FWPCA further allows the states to assume responsibility for granting NPDES permits for discharges into navigable waters within the state's jurisdiction. Section 402(b).

These NPDES permits can only be obtained if the resulting discharge will meet other applicable requirements of the FWPCA. One of these requirements is that publicly-owned treatment works achieve effluent limitations based upon secondary treatment by July 1, 1977. Section 301(b)(1)(B). Ocean discharges are further required to be in compliance with guidelines developed by the EPA after consideration of a wide range of environmental, health, esthetic, recreational and economic values. Section 403, 33 U.S.C. § 1343. Disposal of sewage sludge which would result in any pollutant from such sewage sludge entering the navigable waters is also prohibited except pursuant to a permit. Section 405(a), 33 U.S.C. § 1345.

B. Physical Setting.

Sewage from Los Angeles is processed at the Hyperion Wastewater Treatment Plant and the resulting products are discharged into the Pacific Ocean. Most of the sewage receives only primary treatment; the resulting effluent is discharged into the ocean through an outfall extending five miles into the Pacific. About

one-third of the sewage is given additional secondary treatment and the resulting sludge is discharged through a seven mile long outfall. A third outfall of one mile is used only in emergencies.

C. Administrative Action.

On March 26, 1973, the EPA and the California State Water Resources Control Board entered into an understanding which gave the state primary responsibility for administering the NPDES program in California, but allowed the EPA to retain jurisdiction over discharges beyond the limits of the three-mile territorial sea. *See* p. 9 *infra*. The initial NPDES permit for the Hyperion plant was jointly issued by the EPA and the California Regional Water Quality Control Board, Los Angeles Region (CRWQCB). This permit, issued after a public hearing, authorized discharges from the one and five mile outfalls on the condition that effluent limitations based on full secondary treatment be attained by October 1, 1979. On August 18, 1975, a new permit was jointly issued which authorized discharges from all three outfalls. The 1974 permit was explicitly rescinded at this time. The new permit retained the compliance schedules designed to achieve full secondary treatment of wastewater and added a compliance schedule designed to eliminate all ocean discharge of sewage sludge within thirty months after concept approval of a plan for alternate disposal of the sludge. Conditional approval of the use of the Palos Verdes

landfill as an alternate disposal site was given by the EPA on October 11, 1975.

During the next two years the CRWQCB, apparently acting alone, amended the compliance schedule contained in the 1975 permit three times. The first change was to insert definite dates in the sludge-out compliance schedule, with elimination of sludge discharge into the ocean required by April 1, 1978. After the city missed the first interim deadlines in early 1976, the compliance schedule was again amended by the state to delay final elimination of slude discharge until April 1, 1980. The final change, made in late 1976, merely extended one of the interim dates in the compliance schedule, while retaining April 1980 as the ultimate sludge-out date.

On July 29, 1976, the EPA notified the City of Los Angeles that the NPDES permit for Hyperion would expire on February 1, 1977 and that a new permit would have to be obtained if discharges were to continue past that date. On July 30, 1976, the city submitted an application for a new permit to the CRWQCB. A duplicate copy of this application was sent to the EPA. However, on January 24, 1977, after a public hearing, the EPA and the CRWQCB jointly changed the expiration date of the existing permit from February 1, 1977 to June 30, 1977. The stated reason for the extension was that adequate review time for a new permit was not available. The record also indicates that both agencies were aware of action in Congress which might extend the compliance dates applicable to this project. The extension was seen as a way of avoiding issuing a new permit

that might be quickly outdated by changes in the underlying law.

Prior to the extention of the permit expiration date to June 30, 1977, petitioner PLF had written to the Regional Administrator of the EPA protesting the secondary treatment and sludge-out requirements in the Hyperion permit. This letter asserted that the EPA was misinterpreting the requirements of the FWPCA and that a proper interpretation required that ocean discharge limitations be imposed only after a complete environmental, economic, and social assessment of the factors involved. This letter did not include any specific objection to the proposed extension of the permit, but instead objected generally to the existing permit conditions. The EPA responded to this letter after the January 24, 1977 extension had been granted, saying that it still held to its interpretation of the FWPCA and therefore would not change any of the permit conditions.

By the end of April 1977 the EPA had decided to extend the existing permit until December 17, 1979. The City of Los Angeles was notified of this proposal and a general public notice was published in the Los Angeles Times. PLF, because it had not specifically requested to be on the mailing list for notice of proposed action regarding the Hyperion plant, did not receive individual notice of this proposal. No written objections to the extension were filed nor was a public hearing requested. On May 23, 1977, at a public hearing, the CRWQCB officially extended the expiration date of its permit until December 17, 1979. The

EPA permit was officially extended on June 2, 1977 with no further public notice or hearing. Petitioner Kilroy requested an adjudicatory hearing on the permit extension on June 13, 1977. The EPA denied this request because it found that no factual questions suitable to resolution at an adjudicatory hearing were presented by the request. The legal questions raised by Kilroy regarding the proper interpretation of the FWPCA were certified to the EPA General Counsel. EPA's legal position was set forth in a memo from the General Counsel issued on October 18, 1977.

On August 18, 1977, a petition for review of the Administrator's action was filed in this court by PLF and Mr. Kilroy. A similar petition was filed by the City of Los Angeles on August 31, 1977. These petitions were consolidated by order of this court on December 23, 1977. That order also stayed the terms, conditions and requirements of the permit pending final disposition of these consolidated cases.

II.

Appellate Court Jurisdiction.

A. Modification or Issuance.

We are faced initially with the question of whether we have jurisdiction to hear this case. Section 509(b)(1)(F) of the FWPCA, 33 U.S.C. § 1369(b)(1)(F), provides that "review of the Administrator's action in *issuing or denying* any permit under section 402 may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial

district in which such person resides or transacts such business" (emphasis added). The Administrator's *extension* of the expiration date of a permit clearly is not *expressly* included in the list of reviewable actions.

Section 509 generally has been strictly construed. The Second Circuit has held that it does not grant jurisdiction to review state action in issuing or denying an NPDES permit under section 402(b). *Mianus River Preservation Committee* v. *EPA*, 541 F.2d 899 (2d Cir. 1976). Both this Circuit and the Fifth Circuit have held that the Administrator's action in vetoing or failing to veto a permit granted by a state does not come within the scope of the term "issuing or denying any permit." *State of Washington* v. *EPA*, 573 F.2d 583 (9th Cir. 1978); *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282 (5th Cir. 1977). Focusing on the fact that section 509 provides only for review of the Administrator's action, the *Mianus River* court held that since the permitting action involved in that case was carried out solely by the state, there was no action by the Administrator to review. Both *State of Washington* and *Save the Bay* reasoned that section 509 applies only to direct permitting activities of the Administrator and not to his discretionary review of state permitting decisions.

Here the question is different. The action is that of the Administrator and consists of extending a permit. As will appear in Part II.B. of this opinion, this extension by the Administrator is more than failing to veto the state-granted extension. The critical is-

sue, as we see it, is whether for the purposes of section 509(b)(1)(F) an extension amounts to an issuance. We know of no authority directly in point nor is the legislative history helpful. The proper resolution, we believe, is to treat a permit extension the same as a permit issuance. Functionally, there is no difference between reissuance of a permit for a certain period from the date of its expiration and an extension of the same permit for the same period. Therefore, we hold that we have jurisdiction under section 509(b)(1)(F) to review the Administrator's action in extending the permit.

This holding is a narrow one; it is not intended to suggest that any modification of an existing permit amounts to an issuance of the entire permit for the purposes of section 509(b)(1)(F). Modification alters the meaning and scope of only those provisions modified; extension affects all provisions by projecting their life.

An extension remains an issuance even when accompanied by modifications authorized by section 402(a)(3), 33 U.S.C. § 1342(a)(3); such modifications, however, when unaccompanied by an extension are not an issuance. The hallmark of issuance is its projection into the future beyond the reach of an existing permit. Modifications do not so project. In this manner a section 402(a)(1) issuance can and should be distinguished from a section 402(a)(3) modification.

Therefore, we repeat, the June 2, 1977 permit extension by the EPA was the *issuance* of a permit for the purposes of section 509(b)(1)(F).

B. Authority of EPA to Extend Permit.

Although the EPA in fact granted an extension of the permit, which for purposes of section 509(b)(1)(F) we are prepared to treat as an issuance, the City of Los Angeles sharply challenges the authority of the EPA to so issue such permit. It contends that authority to issue permits such as that with which we are concerned has been delegated to the State of California under Section 402(b) of the FWPCA, 33 U.S.C. § 1342(b), and that, as a consequence, the sole jurisdictionally effective extension was accomplished by the state. Under these circumstances, *State of Washington*, *supra* and *Mianus River*, *supra*, would deprive this court of jurisdiction to review state action under section 509(b)(1)(F).

The flaw in this argument, however, is that the state's extension was not the only juridically effective extension. The permit, as extended, applies to discharges *beyond* the "territorial seas," defined in section 502(8), 33 U.S.C. § 1362(8), as "the belt of the seas . . . extending seaward a distance of three miles." We hold that only the Administrator has authority to grant permits to such areas. Therefore, even if the Administrator's power over those portions of the permit applicable to navigable waters within the "territorial seas" is limited to vetoing state action, *State of Washington*, *supra* at 586-87, the permit extension, to be juridically effective in its entirety, requires additional action by the Administrator. This action is subject to review because, within the limits

of the Administrator's power, all provisions of the permit were reissued by the extension.

Our holding that only the Administrator has authority to grant permits beyond the "territorial seas" is required by the FWPCA. Section 402(b), 33 U.S.C. § 1342(b), authorizes a state "desiring to administer its own permit program for discharges into *navigable waters* within its jurisdiction" (italics supplied) to submit such a program to the Administrator for approval. The legislative history of the FWPCA makes clear that Congress intended for the states to the primary permitting authority. Section 101(b), 33 U.S.C. § 1251(b); A Legislative History of the Water Pollution Control Act Amendments of 1972, Serial No. 93-1, 93rd Cong., 1st Sess. (1973) Vol. 1 at 262 (hereinafter Leg. History). Nonetheless, "navigable waters" is defined to mean "waters of the United States, including the territorial seas," section 502(7), 33 U.S.C. § 1362(7), but not including explicitly either the "contiguous zone" or the "ocean," both of which, under the definitions of the FWPCA, occupy areas beyond the "territorial seas."

The "contiguous zone" embraces "the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone." Section 502(9), 33 U.S.C. § 1362(9). Article 24 of the Convention describes the "contiguous zone" as "a zone of the high seas contiguous to its territorial sea . . . ." 15 United States Treaties and Other International Agreements, Part 2, 1612 (1964). Finally, "ocean" is defined by

the FWPCA to mean "any portion of the high seas beyond the contiguous zone." Section 502(1), 33 U.S.C. § 1362(10). These two areas, the "contiguous zone" and the "ocean," clearly extend beyond the "navigable waters," the outer limits of which mark the extent of the power of the states to administer their own permit programs. Had Congress intended the power of the states to extend beyond the territorial seas it easily could have so provided. Having not done so, we can hold only as we have indicated. Beyond the territorial seas only the Administrator, we repeat, has authority to issue permits.

Our conclusion is further strengthened by the FWPCA's definition of the EPA's permit granting authority. The Administrator is authorized "to issue a permit for the discharge of any pollutant." Section 402(a)(1), 33 U.S.C. § 1342(a)(1). The term "discharge of a pollutant" is thereafter defined to mean "(A) any addition of any pollutant to *navigable waters* from any point source, (B) any addition of any pollutant to the waters of the *contiguous zone* or the *ocean* from any point source other than a vessel or other floating craft." (Italics supplied). Section 502(12), 33 U.S.C. § 1362(12). Again it is apparent that "ocean" and "contiguous zone" waters are not included within the scope of the term "navigable waters" as it is used in the FWPCA and therefore cannot be required by the state. Federal action is required.

Our view regarding the scope of the state's permitting authority is also supported by the legislative history. Section 402(a)(5), 33 U.S.C. § 1342(a)

(5), provides authorization for states to grant permits on an interim basis "for discharges into the navigable waters within the jurisdiction of such State." This description of the scope of state permitting authority is similar to the state authority granted by section 402(b) on a permanent basis. In the Report of the House Committee on Public Works, the subsection (a)(5) permit authority is limited to "discharges into the navigable waters within the jurisdiction of such State (but not in the contiguous zone or the ocean)." Leg. History at 813. Congress, no doubt, intended a similar limitation on state jurisdiction under section 402(b).

This conclusion is not undermined by section 402(c) which provides for the suspension of EPA permitting authority once a state permit program is authorized. The suspension affects only that which the state is permitted to exercise. *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976) is relevant. There the Supreme Court ruled that state permitting authority did not extend to discharges from federal installations located in the state. The Court rejected an argument that section 402(c) necessarily required the EPA to suspend completely the issuing of permits for discharges in that state. *Id.* at 224-26 n.39. The Court found that since Congress did not intend for the states to have permitting authority over federal installations, permit authority over those installations should remain with the EPA. Similarly here, inasmuch as Congress did not intend for state jurisdiction to apply to discharges past the three-mile territorial sea, it is appropriate to hold that the

EPA retains jurisdiction to grant permits for such discharges.[1]

Inasmuch as the Administrator's June 2, 1977 action amounted to the issuance of a valid permit, we hold that under section 509(b)(1)(F) we have jurisdiction to consider the petitions before us.

III.

Federal-State Coordination of Permit Actions.

Our analysis results in the EPA retaining jurisdiction over both the five and seven mile outfall discharges, while the State of California has permitting authority over the one mile emergency outfall because it is within the three-mile territorial sea. Joint action seems the most sensible way of dealing with the problems created by this splitting of jurisdiction. We find nothing in the legislative history to suggest that such joint action is contrary to Congressional intent. On the contrary, there is strong support in the legislative history for a conclusion that Congress wanted to encourage a federal-state partnership for the control

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[1] Petitioners point out the extensive debate in Congress over the interaction between the FWPCA and the Marine Protection, Research and Sanctuaries Act of 1972. They argue that since the FWPCA controls all discharges from outfall pipes, no matter how far out into the ocean the pipe extends, while the MPRSA covers all other ocean dumping, all jurisdiction retained in the FWPCA should be delegable to the states. We fail to see the logic of this reasoning. The regulation of ocean dumping is totally unrelated to the specific question here being considered.

of water pollution. Leg. History at 1279 (comments of Senator Montoya).

The Supreme Court in *EPA* v. *State Water Resources Control Board, supra,* recognized that problems of coordination might result from allowing both the EPA and the state to issue permits for discharges within the state. This did not impel the Court to alter its conclusion. It observed that "these possible problems of coordination . . . fail to provide an adequate basis for finding a clear congressional intention to subject federal dischargers to the degree of control inherent in adhering to state permit requirements . . . ." *Id.* at 221. Similarly here, we recognize the problems involved in coordinated action; nevertheless, we cannot hold under the terms of the FWPCA that joint action is improper and that all authority must be turned over to the state to avoid conflicts.

Joint action in this particular case is complicated by the structure of California law which in effect requires that all discharges from the Hyperion plant be covered by a state permit. The Porter-Cologne Act imposes on "any political agency or entity of this state discharging waste . . . outside the boundaries of the state in a manner that could affect the quality of the waters of the state" the duty to file information regarding the discharge. Calif. Water Code § 13260. Thereupon the regional water quality control boards are empowered to prescribe requirements governing the discharge. Calif. Water Code § 13263. Discharges from the five and seven mile outfalls "could affect the quality of the waters of the state"; thus, they are per-

haps subject to state permitting. The extent to which, and the circumstances under which, state authority over discharges at the five and seven mile outfalls may be preempted is not an issue before us.

Here we need only point out that, given the split jurisdiction over discharges from the Hyperion plant, coordination between the federal and state authorities is imperative. The record here, despite suggestions by the petitioners to the contrary, does not reflect a contumacious refusal by either authority to recognize this necessity.

IV.

Availability of an "Opportunity For Public Hearing."

Having held in Part II of this opinion that our jurisdiction properly was invoked pursuant to section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F), it follows that our review of the extension must consider the issues that ordinarily arise on petitions to review the issuance of any permit pursuant to the authority of section 402, 33 U.S.C. § 1342.

Initially, this means that the application for review must have been made within ninety days of the issuance. This requirement was met in this case. The petitions were filed on August 18 and 31, 1977, well within ninety days from the June 2, 1977 date of issuance. Next, issuance must follow an "opportunity for public hearing." Section 402(a)(1). We hold that no proper "opportunity for public hearing" was provided in this case.

The analysis supporting this conclusion must commence with *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1262 (9th Cir. 1977), in which we held that the hearing provisions of the APA, 5 U.S.C. §§ 554, 556 and 557 were applicable to the issuance of section 402 permits.[2] Section 554(c) provides:

> "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title."

The "opportunity" of which section 554(c) of the APA speaks is, by reason of *Marathon Oil Co.* v. *EPA*, *supra*, the "opportunity for public hearing" of which section 402(a)(1) of the FWPCA speaks.

In this case all parties agree that the EPA never conducted a hearing regarding the extension of the permit. The Administrator contends, however, that an "opportunity" was provided notwithstanding the absence of a hearing. He points to the fact that notice of the proposed extension and the availability of a hearing was published in the Los Angeles Times. Since no one requested a hearing, EPA argues, there was not significant public interest to necessitate holding a hearing. *See* 40 C.F.R. § 125.34(a).

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[2] Similar holdings have been made in U.S. Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977) and Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978).

The Administrator misconceives the showing that must be made to demonstrate that adequate opportunity for a hearing has been given. The necessity of a hearing turns not only on the vigor with which interested parties clamor for one, but also on whether a showing has been made demonstrating that a hearing is unnecessary. *See United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971); *American Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, 509 F.2d 29, 37-38 (8th Cir. 1974). We find persuasive the observations of the court in *Independent Bank Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975) concerning the "opportunity for hearing" provision of section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8). The court stated:

> "The case law in this Circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided for by statute. The agency, however, carries a heavy burden of justification. Where Congress has plainly given interested parties the right to a full hearing, the agency must show that the parties can gain nothing thereby, because they disputed none of the material facts upon which the agency's decision could rest."

Id. at 1220.

The fact that no one requested a hearing prior to the decision is appropriately considered in this analysis, but it is not decisive.[3] It must be shown that the material facts supporting the decision are not subject to dispute.[4] We realize that this is a

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[3] We recognize that National Independent Coal Operators Association v. Kleppe, 423 U.S. 388, 397-98 (1976) suggests in dictum that a failure to request a hearing waives any right to a hearing and that the power to require a hearing by a request therefor constitutes "an opportunity" for a hearing. That case, however, involved the assessment of penalties against coal mine operators found to have unsafe conditions in their mines pursuant to the Federal Coal Mine Health and Safety Act of 1969. The failure of the operator in that situation to object to the fine almost inevitably leads to the conclusion that he is not disputing any of the facts underlying the action. In the case before us, while the failure of the city to request a hearing may suggest that it does not contest any of the facts supporting the issuance of the permit, the failure of PLF and Kilroy to request a predecision hearing does not lead to the same conclusion. Newspaper notice may not reach all interested parties. Interested citizens may not realize that they need to request a hearing if they are interested in an issue. Particularly in light of the known public opposition to use the Palos Verdes landfill, we are unwilling to say that the mere failure to request a predecision public hearing is decisive of the question whether a hearing need be held.

[4] The Supreme Court has held that in some situations the burden of demonstrating that there are disputed issues of material fact may be placed on the party challenging the agency's action. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 620 (1973); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). These cases are inapposite here, however, because they involved situations in which established regulations clearly applied to preclude the petitioner's arguments from succeeding. In such a situation, placing the burden on the petitioner to show in fairly precise terms why a particular exception should be made will save the

not inconsiderable burden to place on the agency, but it is appropriate in view of the strong policy in favor of holding public hearings before an adjudicative decision is made. *Marathon Oil, supra,* at 1261-62.

We cannot say a hearing prior to the June 2, 1977 extension would have served "absolutely no purpose" nor can we say that a hearing subsequent to a remand of this case would be futile. We reach this conclusion after assuming, *arguendo,* that section 301 of the FWPCA, 33 U.S.C. § 1311, requires the elimination of the discharge of sludge in the ocean and that the water pollution problems of disposal of sludge on land have been made a responsibility of the State of California pursuant to the section 402(b) delegation discussed in Part II.B., *supra. See Pacific Legal Foundation* v. *Quarles,* 440 F. Supp. 316 (C.D. Cal. 1977). Nonetheless, inasmuch as the permit given by the EPA and reissued by its letter of June 2, 1977 inevitably required cooperation between the EPA and the state with respect to the EPA's termination of the discharge of sludge in the ocean and its disposal by the state on the land, it is apparent to us that the reasonableness of the EPA's compliance schedule depends upon facts that may be disputed and with respect to which the record in this

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agency from having to conduct full evidentiary hearings only to deny routinely the application of the challenging petitioner for failure to meet an initial prerequisite. In the case before us, however, there is no such established rule setting forth specific prerequisites to a hearing. Whether an adequate "opportunity" has been provided must turn on a more subtle analysis of the entire situation.

case is silent. Such facts as the adequacy of the Palos Verdes or other landfill site, the ability of the city to acquire the capacity to transport the sludge within the time limits fixed by the permit, and the possible effect on navigable waters of land disposal are relevant to determining whether the sludge-out compliance schedule is supported by "substantial evidence." 5 U.S.C. § 706(a)(E) (1970).

Yet, on this record we can conclude unequivocally neither that the parties have no dispute about these matters nor that they do. Under these circumstances we are unable to deny an adjudicatory hearing on the ground that none of the material facts upon which the EPA's decision rests are disputed. Although ordinarily we might conclude that a silent record reflects no disagreement as to material facts, the special circumstances of this case cautions us against that course here. We acknowledge that, should a showing on remand be made in a proper manner that no dispute as to material facts exists, it would be necessary for us to reconsider our holding that no "opportunity for hearing" was provided.

Among the special circumstances of this case is the division of jurisdiction over discharges in the ocean between the federal and state authorities which significantly complicates compliance by an affected agency. It becomes both possible and tempting for each authority to deny responsibility by attributing the command in question to the other. The ease with which this can be done increases as the opportunities for confrontation in a hearing setting diminish. Con-

siderations such as these may properly influence our decision about whether a hearing in the situation before us would be useless.

We also note that petitioner Kilroy requested an adjudicatory hearing pursuant to 40 C.F.R. § 125.36 ten days after the decision to extend the permit was announced. A hearing allowing for reconsideration of the decision is clearly preferable to no hearing at all.

Finally, we are influenced by the fact that the record before us is barren of any explanation of the extension of June 2, 1977. Even if this were treated as a "modification" of a pre-existing permit under section 402(a)(3), we would confront a serious problem in determining whether the extension was arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A). An adjudicatory hearing undoubtedly will yield a record that will provide the reasons for the extension.

V.

Absence of Ocean Discharge Guidelines.

Before framing our remand of this case we must consider the petitioner's contention that the extension of the permit was invalid because it occurred at a time during which no guidelines established under section 403(c) of the FWPCA, 33 U.S.C. § 1343(c) existed. Section 403(a) provides:

> "No permit under section 402 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be

> issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 402 of this title if the Administrator determines it to be in the public interest."

At the time the original permit was issued ocean discharge guidelines were in effect. These were rescinded on January 11, 1977 and new guidelines did not exist on June 2, 1977. The original permit was in compliance with the then existing guidelines.

Petitioners contend, and we agree, that the last sentence of section 403(a) does not provide the answer to their assertion of invalidity. This sentence is specifically designed to cover only the period befor the promulgation of the initial guidelines. Leg. History at 324. The problem we confront is different. Specifically, it is whether a permit, issued in compliance with then existing guidelines, validly can be reissued at a time during which the previous guidelines have been withdrawn for revision. We hold such reissuance to be valid. It is, by relation back to the original issuance, "in compliance with such guidelines" as the statute requires. We need not consider in this case the circumstances under which relation modifications that accompanied the extension. At some point an "extension" may become an original issuance rather than a reissuance. Such circumstances do not exist here, however.

VI.

The Remand.

The absence of a proper hearing requires us to remand this proceeding to the Administrator to conduct such a hearing.

This Court, by an order of December 23, 1977, stayed the NPDES permit pending the disposition of this case. Our order provided that the "terms, conditions and requirements" of the NPDES permit applicable to the Hyperion Treatment Plant are stayed with the "exception that effluent limitations which were applicable to the Hyperion Plant and which were in effect for the discharges from the Hyperion Plant on January 1, 1977, and monitoring and reporting requirements related thereto shall remain in effect to maintain the *status quo* and to ensure continued protection of the marine environment." This stay, again subject to the above exception, is continued pending a proper hearing. It shall terminate at such time following the hearing as the Administrator promulgates a new permit, extends that in effect on January 1, 1977, or terminates the permit.

REMANDED.

APPENDIX B

June 13, 1977

PMS PAUL DEFALCO JR REGIONAL DIRECTOR REGION IX UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RDM REPORT DELIVERY BY MAILGRAM, DLR
100 CALIFORNIA ST
SAN FRANCISCO CA 94111

REQUEST FOR AN ADJUDICATORY HEARING PURSUANT TO 40 CFR SECTION 125.36

1. NAME AND ADDRESS OF REQUESTOR

   JOHN B KILROY SR
   870 STRADA VECCHIA
   LOS ANGELES CA 90024

2. INTERESTS OF REQUESTOR

   MR KILROY AS A RESIDENT OF LOS ANGELES IS DIRECTLY AFFECTED BY ANY PROPOSAL SIGNIFICANTLY AFFECTING THE OPERATION OF THE HYPERION TREATMENT PLANT AND THE ENVIRONMENT OF THE LOS ANGELES AREA

3. PARTICIPATION BY REQUESTOR

   REQUESTOR AGREES TO COMPLY WITH THE TERMS OF 40 CFR SECTION 125.36(B)(2)(IV)

4. REASONS FOR THE REQUEST

   REQUESTOR ASKS THAT THE DECISION OF EPA TO EXTEND THE EXPIRATION OF NPDES PERMIT CA010991 BE SET ASIDE FOR THE FOLLOWING REASONS:

   1. THE 30 DAY NOTICE PRIOR TO HEARING (SECTION 125.32(A)) AND THE 30 DAY PERIOD FOR PUBLIC INPUT MANDATED BY 40 CFR SECTION 125.32(B)(1) WERE NOT COMPLIED WITH THERE-

FORE DENYING REQUESTOR AN OPPORTUNITY TO BE HEARD.

2. THE PROCEDURES FOR ISSUANCE OF AN NPDES PERMIT PURSUANT TO 40 CFR SECTION 125.2 ET SEQ. WERE NOT FOLLOWED, THERE ARE NO PROVISIONS IN THE REGULATIONS FOR THE EXTENSION OF THE EXPIRATION OF AN NPDES PERMIT.

5. ISSUES TO BE RAISED

REQUESTOR WOULD RAISE THE FOLLOWING ISSUES:

1. WHETHER THE REQUIREMENTS OF THE PERMIT SHOULD BE MODIFIED IN THAT THE PROJECT THAT IS THE SUBJECT OF THE COMPLIANCE SCHEDULE SET FORTH IN NPDES PERMIT CA010991 IS BEING EVALUATED IN AN EIS BY THE EPA PURSUANT TO THE REQUIREMENTS OF NEPA, THE COMPLIANCE SCHEDULE SHOULD NOT BE MANDATED IN AN NPDES PERMIT UNTIL THE NEPA STUDY IS COMPLETED; AND

2. WHETHER THE PROCEDURES USED AND THE RECORD DEVELOPED WERE ADEQUATE ISSUANCE OF AN NPDES PERMIT.

REQUESTOR WOULD PROPOSE TO SET ASIDE THE ACTION TAKEN TO EXTEND THE EXPIRATION DATE OF NPDES PERMIT CA010991 AND PROVIDE FOR FULL ADMINISTRATIVE PROCEDURES REQUIRED FOR THE ISSUANCE OF AN NPDES PERMIT.

DONALD M PACH ATTORNEY FOR JOHN B KILROY SR. PACIFIC LEGAL FOUNDATION 455 CAPITOL MALL SUITE 465 SACRAMENTO CA 95814

APPENDIX C

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

100 California Street
San Francisco, California 94111

In Reply E-2
Refer to: HEA-1

CERTIFIED MAIL NO. 474683
RETURN RECEIPT REQUESTED

June 23, 1977

Donald M. Pach, Esq.
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, CA 95814

Subject: NPDES Permit No. CA0109991—
City of Los Angeles

Dear Mr. Pach:

We are in receipt of your telegram dated June 13, 1977, requesting an adjudicatory hearing on the above subject permit on behalf of John B. Kilroy, Sr.

I have determined that the request does not set forth material issues of fact relevant to the question of whether a permit should be issued or modified, and that the request does not meet the requirements of

40 CFR 125.36(c)(1)(ii). I therefore deny the request, and my final determination remains in effect. The request does, however, present issues of law relating to interpretations of regulations promulgated under the Federal Water Pollution Control Act which should be referred to the General Counsel for decision pursuant to 40 CFR 125.36(m)(3). Therefore, I am certifying to the General Counsel for decision the issues of law raised by your request. A copy of my certification is enclosed.

Sincerely,

Original signed by
R. L. O'Connell
for Paul De Falco, Jr.
Regional Administrator

Enclosure

cc: City of Los Angeles (w/enc.)

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

Docket No. IX-WP-77-4

IN THE MATTER OF:

National Pollutant Discharge
Elimination System (NPDES)
Permit No. CA0109991 Issued
to CITY OF LOS ANGELES

CERTIFICATION OF ISSUES OF LAW

A request for an adjudicatory hearing, dated June 13, 1977, was received from Donald M. Pach, on behalf of John B. Kilroy, Sr., that raises the following issues of law which require a decision of the General Counsel pursuant to 40 CFR 125.36(m)(3):

1. Must EPA conduct an informal public hearing prior to taking action to extend the expiration date of an NPDES permit where public notice of the proposed action was published more than 30 days in advance of the action?

2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date?

3. May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a

grant should be made to assist in the construction of the project?

Pursuant to 40 CFR 125.36(m)(2), each party may file a brief with the General Counsel within twenty (20) days of the date of this certification. The briefs shall contain:

(1) A subject index of the issues presented in the brief, with page references, and a table of statutes, cases, textbooks, and other material cited, with page references;

(2) A concise statement of each referred issue;

(3) A discussion of each issue, including arguments in favor of the referring party's position and citations to cases, statutes, legislative history, etc., tending to support such positions; and

(4) A recommended decision for each referred issue.

Forwarded herewith is a copy of the record of procedures and action taken in the modification of the subject permit by extending the termination date.

Dated: June 23, 1977

/s/ R. L. O'Connell
for PAUL DEFALCO, JR.
Regional Administrator

APPENDIX D

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Docket No. IX-WP-77-4

IN THE MATTER OF
National Pollutant Discharge
Elimination System (NPDES)
Permit No. CA0109991 Issued
To City of Los Angeles

BRIEF OF PACIFIC LEGAL FOUNDATION ON BEHALF OF JOHN B. KILROY ON CERTIFIED QUESTIONS TO GENERAL COUNSEL

[Table of Contents and Authorities Omitted]

INTRODUCTION

The issues of law certified to the General Counsel by the Environmental Protection Agency (EPA) Regional Administrator of Region IX are not an accurate reflection of the issues which would have been raised at the adjudicatory hearing requested pursuant to 40 C.F.R. § 125.36. Requestor of the adjudicatory hearing, John B. Kilroy, proposed to raise two basic issues:

1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and

2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1281, *et seq.* (See Attachment A.)

ISSUES PRESENTED

John B. Kilroy (hereinafter requestor) will address, in part, issues two and three certified to the General Counsel. Issue two is as follows:

> "2. Must a detailed factual record be develeoped prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date?"

In issue two, the Regional Administrator makes two assumptions: (1) that the extension of the expiration date of an NPDES permit is authorized, and (2) that it could be construed as a modification. Requestor denies the validity of both assumptions and will present his arguments in I and II below.

Issue three certified to the General Counsel is as follows:

> "3. May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project?"

For clarity, requestor will divide his discussion of issue three into two parts. First, may the expiration date of an NPDES permit be extended (*i.e.*, without issuing a new permit) and second, should a project which is the subject of an EIS be mandated in a compliance schedule of an NPDES permit which is being newly issued where such schedule would require implementation prior to completion of the NEPA-EIS process? These issues will be addressed in arguments III and IV below.

ARGUMENT

I

EPA HAS NO AUTHORITY TO EXTEND THE EXPRIATION DATE OF AN NPDES PERMIT

Pursuant to 33 U.S.C. § 1342(a)(2), "the [NPDES] permit program of the Administrator . . . shall be subject to the same terms, conditions, and requirements as . . . permits issued . . . under subsection (b) . . . ." Subsection (b) is entitled "State permit programs." The Regional Administrator is subject to the requirements set out in subsection (b) and the regulations adopted pursuant to the applicable statutes.

Title 33, United States Code, § 1342(b)(1)(B) provides that NPDES permits are to be for *fixed* terms not exceeding five years. The regulations adopted pursuant to this authority, as set out in 40 C.F.R. §§ 124.51 [1] and 125.25(c)[2], make it clear that it is the intent of EPA to issue an NPDES permit for a fixed term. The use of "term" in this context is separate and distinct from the use of the word "terms" found in other parts of the applicable statutes and regulations. As used to describe the duration of an NPDES permit, "fixed term" is clear and unambiguous. The date of issuance will fix the beginning date and the ending date will fix the expiration date. Upon the expiration of the fixed term, set forth in the permit pursuant to the mandates of 33 U.S.C. § 1342(b) and 40 C.F.R. §§ 124.51 and 125.25 (c), the permit will no longer be in force. To continue to discharge after the expiration date of the fixed term, the permittee must apply for issuance of a new permit.[3]

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[1] 40 C.F.R. § 124.51. "Duration of issued NPDES permits."
"Any State or interstate agency participating in the NPDES shall provide that each issued NPDES permit shall have a fixed term not to exceed 5 years."

[2] 40 C.F.R. § 125.25(c). "Duration of permits."
"(c) All permits will be for a fixed term."

[3] *See* Attachment B hereto, correspondence from Stanley Leibowitz, Chief, General Services Section, EPA, to Donald Tillman, Los Angeles City Engineer, regarding the expiration of Permit No. CA0109991 and the necessity to obtain a new permit and Donald Tillman's response to that communication.

EPA is bound by both the applicable statutes and regulations. Both the statutes and regulations mandate that an NPDES permit be for a fixed term, which by definition precludes EPA from extending the expiration date of an existing permit. An example would be appropriate to ilustrate the abuses which could result if EPA were allowed merely to extend the expiration date of a permit. Suppose that an NPDES permit were issued for a 90 day fixed term. The public would not be too alarmed at such a short duration, and there would probably be no challenge to the pollutants being discharged. If at the end of the 90 day period, EPA extended the expiration date for four years and nine months, which period would not exceed the maximum duration of a permit, then the public could only contest the extension of the permit and not the limitations, restrictions, conditions, and other terms in the permit.[4] It was not the intent of Congress to allow for this type of absurd situation to arise, and yet, if the Regional Administrator's interpretation of his action is allowed to stand it is possible for it to occur. It is recommended that the General Counsel issue a decision that EPA is without authority to extend the expiration date of an existing NPDES permit because of the clear and unambiguous language of the applicable statutes and regulations and the possibility for excessive abuses on the part of EPA.

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[4] 40 C.F.R. § 125.36, Adjudicatory Hearings.

II

THE ACTION TAKEN BY THE REGIONAL ADMINISTRATOR CANNOT BE CONSTRUED AS A MODIFICATION TO AN ISSUED NPDES PERMIT

In question two[5] certified to the General Counsel, the position taken by the Regional Administrator is that the extension of the expiration date of an NPDES permit is a modification of the permit. Incorporating Argument I above, it is contended that the extention of an expiration date cannot be a modification within the framework of the applicable statutes or regulations.

The statutes[6] are definite as to what modifications may be made to an issued NPDES permit. Subpart

---

[5] "Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extention of the permit's expiration date?"

[6] Title 33, United States Code, § 1311(c) provides:

"(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the econmoic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

Title 33, United States Code, § 1342(b)(1)(C)(iii) provides that a permit can be terminated or modified for:

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge." *See also* 33 U.S.C. §§ 1342(b)(1)(C)(i), 1342(b)(1)(C)(ii).

C (40 C.F.R. §§ 125.21-125.28) of the regulations adopted by EPA sets forth the terms and conditions of an NPDES permit. The regulations allow for modification of effluent limitations (40 C.F.R. § 125.28), treatment standards (40 C.F.R. § 125.28(a)(2)), and schedules of compliance (40 C.F.R. § 125.23(d)), which are the terms and conditions upon which an NPDES permit will be issued for a fixed term. It would be anomalous indeed for the expiration date of a permit to be modifiable in the face of the statutes and regulations which provide for issuance of a new permit upon expiration and the statutes and regulations which set out the specific terms and conditions of a permit which are modifiable. The expiration date is conspicuously omitted as a modifiable term.

It is urged that the General Counsel determine that the expiration date of an NPDES permit is not subject to modification. By definition the expiration date must be fixed and is thus not modifiable. Upon expiration, issuance of a new permit is the statutorily and regulatory prescribed method of action.

III

THE ACTION TAKEN BY THE REGIONAL ADMINISTRATOR WAS THE ISSUANCE OF AN NPDES PERMIT

Incorporating the above arguments, the action taken by the Regional Administrator regarding NPDES Permit No. CA0109991 was the issuance of

a new NPDES permit. This conclusion is supported by the provisions of 40 C.F.R. § 125.2(a)(1). The regulations in 40 C.F.R. § 125 "do not prescribe policy or procedures for the issuance of permits by States under programs approved by the Administrator. . . ." (40 C.F.R. § 125.2(b).) NPDES Permit No. CA0109991 was issued by EPA and it appears that the position taken by EPA is that 40 C.F.R. § 125 would apply. (*See* Attachment B.)

It is recommended that the General Counsel determine that the action taken by the Regional Administrator was to issue a new NPDES permit for discharges of pollutants from the Hyperion Treatment Plant previously permitted under NPDES Permit No. CA0109991 which expired on February 1, 1977. As such, the Administrator failed to comply with applicable regulations and erroneously denied John B. Kilroy's petition for an adjudicatory hearing.

IV

A PERMITTEE SHOULD NOT BE FORCED TO IMPLEMENT A PROJECT CONTAINED IN A COMPLIANCE SCHEDULE WHEN THAT PROJECT IS BEING STUDIED IN AN EIS

NPDES Permit No. CA0109991, issued to the City of Los Angeles for the Hyperion Treatment Plant, includes in the schedule of compliance an interim sludge management project which is to be evaluated in an EIS being prepared by EPA in compliance with the

requirements of NEPA and FWPCA. (*See* Attachment C at 3-4.) If EPA continues to mandate the interim sludge management project and the EIS prepared for the project indicates another preferred, more environmentally sound alternative, an irreversible commitment of resources may occur and the NEPA process rendered purely academic, contrary to the intent and policies of NEPA.

On June 3, 1977, the State Water Resources Control Board of California determined that the Secondary Treatment Standards set pursuant to Pub. L. No. 92-500 would require large expenditures for no measurable water quality benefit. (*See* Attachment D at 2.) The interim sludge management project for the Hyperion Treatment Plant is primarily based on requirements set pursuant to EPA's interpretation of 33 U.S.C. § 1311(b)(1)(B). If the primary basis for a project is determined in an EIS to be environmentally unsound, the project's adverse environmental impacts should be mitigated, where feasible. In the instant case, evidence has been presented which casts doubt on the propriety of going forward with this project. Moreover, implementation of the project prior to completion of the NEPA process forecloses any opportunity to expeditiously mitigate any negative environmental consequences. It is incumbent upon EPA to avoid taking action which could cause an irreversible and irretrievable loss of resources.

There is the absence of any compelling need to implement the interim sludge management project prior to completion of the NEPA process. In *Flint Ridge*

v. *Scenic Rivers Association*, —— U.S. ——, 8 E.R.C. 2137 (1976), the Supreme Court held that where statutory limitations preclude preparation of an EIS, then the absence of an EIS will not bar an agency action. In the instant case there is no statutory or regulatory time limit on implementation of the project. NEPA requires that all federal agencies comply "to the fullest extent possible" with the directives of 42 U.S.C. § 4332. Here, EPA has not complied with the dictates of NEPA. An interim project is being mandated which could cause an irreversible and irretrievable commitment of resources when there is no stautory time limit to preclude the prior preparation of an EIS and full evaluation of each alternative, including no project.

Requestor recommends that General Counsel determine that a project which is being studied in an EIS should not be mandated until the EIS has been completed and comments received.

CONCLUSION

There is no statutory authority for the Regional Administrator to extend the expiration date of an NPDES permit, or to treat the extension of the expiration date as a modification. The statutes and regulations unambiguously provide for issuance of a permit for a fixed term, and upon expiration of the term for the issuance of a new permit.

The Regional Administrator has not complied to the fullest extent possible with the dictates of NEPA.

The potential irreparable and irreversible commitment of resources mandated by the implementation of the interim sludge project prior to completion of an EIS defies both logic and the law. It is recommended that the General Counsel adopt this position and provide guidance for future disputes which may arise under FWPCA.

DATED: July 12, 1977.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
THOMAS E. HOOKANO

By /s/ Thomas E. Hookano
THOMAS E. HOOKANO

Attorneys for Requestor

Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154

[Attachments Omitted]

APPENDIX E

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. SECTION 125.36(m)

No. 66

In the matter of National Pollutant Discharge Elimination System Permit for the City of Los Angeles, CA0109991, the Regional Administrator has certified three issue of law to the Office of General Counsel for decision pursuant to 40 C.F.R. Section 125.36(m). The parties, having had the opportunity to provide written briefs in support of their respective positions,[1] present the following issues.

ISSUES OF LAW NO. I AND II

Questions Presented

1. Must EPA conduct an informal public hearing prior to taking action to extend the expiration date of an NPDES permit where public notice of the proposed action was published more than 30 days in advance of the action?

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[1] Briefs were filed by EPA Region IX and by the Pacific Legal Foundation on behalf of John B. Kilroy.

2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date?[2]

Decision

EPA has the authority to extend the expiration date of an NPDES permit by modification of the permit. In any permit modification proceeding an opportunity for public hearing must be provided, but a hearing must be held only if the Regional Administrator finds that there is a significant degree of public interest in the permit modification. Since Kilroy does not specifically argue that the record supporting the permit modification is inadequate this question need not be addressed.

Discussion

On April 27, 1977 a notice of a proposed modification of the NPDES permit issued to the City of Los Angeles for its Hyperion sewage treatment plant was published in the Los Angeles Times. The proposed change was to the expiration date of the permit, which was then June 30, 1977. On June 2, 1977, the

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[2] Kilroy urges that I address the following issue:

> Whether there is authority under the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CAO109991 was the issuance of a new permit.

permit was modified to extend its expiration date to December 17, 1979. No requests for a public hearing prior to modification of the permit pursuant to 40 C.F.R. § 125.34 were made. On June 13, 1977, John B. Kilroy requested an adjudicatory hearing pursuant to 40 C.F.R. § 125.36. That request was denied but three issues of law were referred to the General Counsel.

Kilroy is correct in arguing that federally-issued NPDES permits, no less than State-issued permits, are subject to the requirement that they be for fixed terms not exceeding five years. FWPCA § 402(b)(1)(B) read in conjunction with § 402(a)(3)), 40 CFR § 125.25. But this does not resolve the questions he raises. This requirement of the statute, and EPA regulations, does not forbid modification of the expiration date of a permit, so long as the permit, as modified, as a fixed expiration date and that date is no more than five years from the date it was established. The purpose of § 402(b)(1)(B) is clear; to insure that at intervals not greater than five years the terms and conditions of a permit be subject to reevaluation by the Agency (or State) and that the public have an opportunity to participate in this reevaluation.[3] This purpose is not compromised by a modification of an expiration date such as occurred here, since in no event will more than five years elapse

[3] While the proposed change in a permit may be only to its expiration date, any issue relevant to the extension, such as whether the requirements placed on the discharger should be modified, could be raised.

between opportunities for the Agency, and the public, to decide whether the requirements placed on the discharger should be changed.[4]

Kilroy also argues that the FWPCA and EPA regulations provide authority to modify only certain provisions of a permit and do not provide such authority with regard to the expiration date. But the Act, in § 402(b)(1)(C), says only that permits must be subject to modification for cause, without restricting the power to modify to any particular terms of a permit. Similarly, the three specific causes for modification set out in § 402(b)(1)(C) are clearly inclusive, rather than exclusive. And 40 C.F.R. § 125.22(a)(2) provides that a permit may, for cause, be modified "in whole or in part". Nothing in the statute or regulations expressly or implicitly forbids modification of expiration dates of permits.[5]

[4] Kilroy argues that the ability to modify the expiration date can be abused and used to frustrate the public participation requirements of the Act. Kilroy argues primarily in terms of hypothetical situations, however, and has failed to show that the practical ability of the public to participate in this particular proceeding was infringed. Whether or not abuse may occur in another situation must await another day.

[5] The provisions of 40 C.F.R. § 125.23(d) cover a particular situation when permits may be modified but do not in any way limit the Agency's ability to modify other terms and conditions. Section 125.28, characterized by Kilroy as a permit modification provision, is actually a provision for *adjustment* of effluent limitations or standards to reflect, on a case by case basis, credit for pollutants in intake water. It serves the function, therefore, of defining the terms of a permit, rather than of changing them subsequent to permit issuance. Section 301(c) of the Act serves a similar function with respect

With regard to any permit modification, including a modification of an expiration date, the Agency is required to provide public notice of its intent to modify the permit and must provide an opportunity for a public hearing *See* 40 CFR §§ 125.22(a)(2), 125.32, 125.34. In addition, any interested person may request an adjudicatory hearing pursuant to § 125.36. Thus, the right of the public to be periodically apprised of the status of a discharger's permit and to participate in the permitting process is amply assured. But a public hearing need not necessarily be held. Section 402(b)(3) of the Act provides only that the public "receive notice of each application for a permit and . . . *an opportunity* for a public hearing before a ruling on each application. . . ." (emphasis added.)[6] This is precisely what the Agency's regulations provide. Section 125.32 requires public notice of the proposed issuance or modification of a permit while § 125.34 of EPA's NPDES regulations provides that the Regional Administrator *may* hold a public hearing when he determines either that there is a significant degree of public interest in a permit (§ 125.34(a)) or when he determines that a hearing may provide useful information (§ 125.34(d)). At least where there is little or no public interest ex-

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to defining BATEA for dischargers who lack the economic capability to meet the national effluent limitations guidelines. Section 301(c) variances will not modify permits, but will be relevant to the requirements to be established in permits which will expire on or after July 1, 1983.

[6] *Cf.* The Administrative Procedure Act, 5 U.S.C. §§ 553(c), 554(a), 554(c).

pressed after public notice of a proposed modification the question of whether to hold a public hearing prior to modification of the permit is wholly discretionary.

Finally, it may be observed that Kilroy has failed to show that his legal arguments have any practical implications. Whether EPA modified the old permit or issued a new one has not been shown to have any bearing on the public participation procedures to be followed. In either case public notice would be given and opportunity for public and/or adjudicatory hearings provided. In particular, it does not appear that Kilroy's own request for an adjudicatory hearing would have had to be handled any differently.

Issue of Law No. III

Question Presented

May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project?[7]

---

[7] Kilroy phrases the issue as:

> Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1281, *et seq.*

Decision

EPA has the authority to extend the expiration date of a permit which orders a permittee to go forward with a project despite the fact that the same project is being evaluated in an Environmental Impact Statement (EIS) for the purpose of determining whether a grant should be made to assist in the project's construction.

Discussion

The only legal obstacle to requiring Los Angeles to proceed with the sludge management project which Kilroy appears to raise is that it would conflict with NEPA. But § 511(c) of the FWPCA clearly provides that the EIS requirements of NEPA do not apply to the permit at issue here. The permit for the Hyperion plant is neither a grant of federal financial assistance nor a permit for a new source as defined in Section 306(a)(2) of the FWPCA. Obviously, if NEPA does not apply to the permit issuance it does not apply to extension of the expiration date.

Recently, in *Pacific Legal Foundation* v. *Quarles*, No. 77-521-HP (C.D. Cal. July 20, 1977) the court, dealing with issues raised with regard to the very permit involved here, held that, "the language of Section 511(c) leads to the conclusion that the EPA can, without an EIS, order Los Angeles to build the interim sludge disposal project while the EPA is prevented, until it prepares an EIS, from awarding a grant to help pay for the project." Slip op. at 6.

There thus appears to be no reason why the pendency of the EIS concerning funding of the sludge management project causes any legal problems to arise with regard to the NPDES permit.

October 18, 1977

/s/ Joan Z. Bernstein

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 289411 364

Supreme Court, U. S.
FILED
SEP 4 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1472

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

—*v.*—

PACIFIC LEGAL FOUNDATION, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FILED: MARCH 23, 1979
PETITION GRANTED: JUNE 11, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1472

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

—*v.*—

PACIFIC LEGAL FOUNDATION, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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* "A.R." refers to the administrative record certified by EPA to the court of appeals. "PLF Stay" refers to the "Joint Motion for Stay Pending Review and Affidavit of Robert K. Best" dated September 2, 1977, and PLF's "Reply to Memorandum in Opposition to Motion For Stay Pending Review" dated November 3, 1977, both filed by all petitioners in No. 77-2909 below. "LA Stay" refers to "Memorandum of Amicus Curiae in Support of Joint Motion For Stay Pending Review" dated November 23, 1977, filed by Los Angeles in No. 77-2909. "EPA Stay Opp." refers to EPA's "Memorandum In Opposition To Motion For Stay Pending Review" dated September 30, 1977, filed in No. 77-2909. "PLF Merits" refers to "Petitioners' Opening Brief" dated January 13, 1978, filed by all petitioners in No. 77-2909. "PLF Reply" refers to "Petitioners' Reply Brief" dated February 10, 1978, filed by all petitioners in No. 77-2909. "LA Merits" refers to the "Brief of the City of Los Angeles" in No. 77-3008. "EPA Brief" refers to "Brief for Respondents" dated February 1978 in Nos. 77-2909 and 77-3008. "EPA Pet. Reh." refers to EPA's "Petition for Rehearing." By order filed December 19, 1977, the court of appeals ordered that "the record and all other documents received in these petitions for review * * * are ordered filed." By order filed February 10, 1978, the court ordered that "the volume of exhibits to petitioners' brief heretofore received is ordered filed." See F.R. App. P. 16(b).

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RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
1977	
Aug 22	FILED, AS OF AUGUST 18, ORIG AND SIX COPIES OF A PETITION TO REVIEW AN ORDER OF THE ENVIRONMENTAL PROTECTION AGENCY. —dmf—[77-2909]
	Filed as of August 31, 1977, original and six copies of a petition to review an order of the Environmental Protection Agency—dmf—[77-3008]
Nov 16	REC'D (LATE), AS OF OCT 20, CERT LIST OF RECORD PURSUANT TO RULE 17(b) FRAP.—dmf—
Dec. 28	Filed, as of 12/23/77, order (G & A) upon due consideration, the court issues the following orders: a) the record and all other documents rec'd in these petitions for review, including the amicus curiae memorandum, are ordered filed; b) respondents' motion to consolidate is GRANTED; and c) that the terms, conditions and requirements of NPDES Permit No. CA0109991 on review in these consolidated cases are hereby STAYED with the exception that effluent limitations which were applicable to the Hyperion Plant and which were in effect for the discharges from the Hyperion Plant on 1/1/77, and the monitoring and reporting requirements related thereto shall remain in full force and effect pending final disposition of these consolidated cases or further order of this court. d) the Clerk is directed to calendar these consolidated cases as an expedited appeal, to fix an abbreviated briefing schedule and to notify all counsel of the schedule. jr
1978	
Feb 16	Filed, as of Feb 10, order (Br), Upon due consideration, the volume of exhibits to petitioners' brief heretofore received is ordered filed.—dmf—

DATE	FILINGS-PROCEEDINGS

1978

Feb 16 Filed, as of Feb 10, 25 copies of Exhibits to Petitioners' Brief.—dmf—

Feb 27 FILED AS OF 2/6/78, CERT ADMIN RECORD IN APPEAL IN ONE VOL, VOL I., PLDGS, THREE CERT COPIES. ers

Mar 31 Filed as of 3/29/78, Order (G,A) IT IS ORDERED as follows: (1) Paragraph (c) of this court's stay order of 12/23/78, was meant to include a stay of enforcement of NPDES Permit No. CA0109991 by the USA. (2) The resps and the USA are hereby restrained from instituting such action and from further prosecuting *USA v. City of LA*, CD Cal, Civ No. 77-3047-HP, pending final disposition of these consolidated cases or further order of this court by the panel to which these consolidated cases are assigned for disposition. ers

Apr 10 ARGUED AND SUBMITTED BEFORE MERRILL, SNEED, CJJ, EAST, DJ. jmr

Aug 10 As of Aug. 9, ORDERED OPINION (SNEED) FILED & JUDG TO JUDG TO BE FILED & ENTD

Aug 10 As of Aug. 9, Filed opinion—REMANDED.

Aug 10 As of Aug. 9, Filed & Entd Judgment.—fn—

Nov 28 Filed, as of 11/24/78, order (M, S & East) The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. nw

1979

April 13 Received 3/29/79, SC notice of filing petition for cert. on March 23, 1979, assigned SC#78-1472. pn

June 18 Filed certified copy of SC order of June 11, 1979, granting certiorari. (copies to panel) pn.

California Regional Water Quality Control Board Los Angeles Region (213) 620-4460 Order No. 75-100 Waste Discharge Requirements	Environmental Protection Agency Region IX (415) 556-3450 Permit No. CA0109991 Authorization to Discharge under the National Pollutant Discharge Elimination System-Federal Water Pollution Control Act (33 U.S.C. 125 et. seq.)

FOR
City of Los Angeles
Hyperion Treatment Plant

The California Regional Water Quality Control Board, Los Angeles Region (hereafter Board) and the Regional Administrator, Environmental Protection Agency, Region IX, find that:

1. City of Los Angeles has filed a report of waste discharge and has applied for a permit to discharge wastes under the National Pollutant Discharge Elimination System.

2. Hyperion Treatment Plant, located at 12000 Vista Del Mar Boulevard, Playa Del Rey, California, currently discharges an average of 340 mgd (million gallons per day) of municipal wastewater to navigable waters or tributaries thereto (Santa Monica Bay).

3. Approximately 100 mgd of the flow currently receives secondary treatment by the activated sludge process; the balance is primary effluent.

   a. The combined treated effluent (primary and secondary) is discharged through an outfall terminating 26,525 feet offshore in 187 feet of water. This discharge point, identified as Discharge Serial No. 002, is at Latitude 33° 54′ 45″ N, Longitude 118° 31′ 15″ W.

   b. Separated solids are digested, screened, and diluted one volume digested sludge with three

volumes secondary effluent prior to discharge through an outfall terminating at 35,572 feet offshore at the head of a submarine canyon at a depth of 300 feet. This discharge point, identified as Discharge Serial No. 003, is at Latitude 33° 55′ 35″ N, Longitude 118° 33′ 15″ W.

c. During wet weather when flow exceeds 650 mgd due to infiltration and inflow approximately 0 to 20 million gallons of diverted flow from the secondary settling tanks are discharged for periods of 1 to 8 hours through an outfall which terminates 5,364 feet offshore in 50 feet of water. This wet weather flow occurs approximately once or twice a year. This outfall is also used non-routinely for gravity discharge in cases of power failure at the pumping plant. This non-routine flow occurs approximately two to three times a year for a period less than one hour. This discharge consists of 0 to 4 million gallons of chlorinated secondary effluent. The outfall is also flushed weekly with chlorinated secondary effluent for a period of 3 hours at a flowrate of 100 mgd. This discharge point is identified as Discharge Serial No. 001, at Latitude 33° 55′ 05″ N, Longitude 118° 26′ 52″ W.

4. City of Los Angeles discharges wastes from Hyperion Treatment Plant under requirements contained in Order 74-329 and NPDES permit number CA0109991, issued, respectively, by this Board and the Regional Administrator on November 18, 1974. This Order makes the following significant modification to Order No. 74-329 and NPDES permit issued on November 18, 1974:

   Discharge Serial No. 003, which was not included in Order No. 74-329 and the NPDES permit issued on November 18, 1974, is now regulated by this Order.

5. The City of Los Angeles is participating in a joint study with the County Sanitation Districts of Los Angeles County and the County Sanitation Districts of Orange County to develop an optimum long-range sewage sludge disposal plan. The study is entitled "Regional Wastewater Solids Management Program—Los Angeles—Orange County Metropolitan Area".

6. The City of Los Angeles expects to have interim sludge handling facilities in operation by December 31, 1976. Studies should be conducted by the City of Los Angeles to determine the best method of disposal of the liquid fraction or supernatant from these interim facilities so as not to cause a violation of discharge requirements contained in this permit.

7. The State Water Resources Control Board adopted the "Water Quality Control Plan—Ocean Waters of California" on July 6, 1972. This plan contains water quality objectives for the Pacific Ocean. The Regional Administrator approved this plan on August 18, 1972, thereby establishing this plan as a State—Federal water quality standard.

8. The Board adopted a Water Quality Control Plan for Los Angeles River Basin on March 10, 1975. The Water Quality Control Plan contains water quality objectives for the nearshore and offshore zones of the Pacific Ocean.

9. The beneficial uses of the receiving waters are:

   Nearshore Zone: (includes water generally less than 30 feet deep of those waters within 1,000 feet of the shoreline): aesthetic enjoyment; ocean water contact sport (swimming, surfing, skindiving); propagation and sustenance of marine life, including kelp and shore birds; shellfish harvesting; scientific research and training; sport fishing; commercial fishing; pleasure boating; commercial and naval shipping; and industrial water supply.

Offshore Zone: (includes all waters located between the nearshore zone and the seaward boundary of the Region): aesthetic enjoyment; propagation and sustenance of marine life; scientific research and training; sport fishing; commercial fishing; pleasure boating; commercial and naval shipping; and industrial water supply.

10. Effluent limitations, national standards of performance, toxic and pretreatment effluent standards, and ocean discharge criteria established pursuant to Section 208(b), 301, 302, 303(d), 304, 306, 307, 403, and 405 of the Federal Water Pollution Control Act and amendments thereto are applicable to the discharges.

The Board and Regional Administrator have notified the discharger and interested parties and persons of their intent to prescribe waste discharge requirements and issue a permit for this discharge and have provided them with an opportunity to submit their written views and recommendations.

The Board and the Regional Administrator in a public hearing heard and considered all comments pertaining to the discharge and to the tentative requirements.

This Order and permit shall take effect 30 days from the date of signature.

IT IS HEREBY ORDERED, that City of Los Angeles, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, and the provisions of the Federal Water Pollution Control Act and regulations and guidelines adopted thereunder, shall comply with the following:

A. Effluent Limitations

1. Wastes discharged shall be limited to treated municipal wastewater, as proposed.

2. The discharge of an effluent in excess of the following limits for Discharge Serial No. 001 is prohibited:

Parameter	Units	30-Day Average	7-Day Average	Daily Maximum
BOD_5 20°C	lbs/day*	25,000	37,500	50,000
	mg/1	30	45	—
Suspended solids	lbs/day*	25,000	37,500	50,000
	mg/1	30	45	—
Fecal coliform	MPN/100 ml	200	400	2,000
Oil and grease	lbs/day*	8,340	—	12,500
	mg/1	10	—	15
Settleable solids	ml/1	0.1	—	0.2
Turbidity	TU	50	—	75
Floating particulates	mg/1 (dry weight)	1.0	—	2.0

* Based on a design capacity of 100 mgd.

3. The discharge of an effluent in excess of the following limits for discharge Serial No. 002 is prohibited.

Parameter	Units	30-Day Average	Daily Maximum
BOD_5 20°C	lbs/day*	438,000	665,000
	mg/1	125	190
Suspended solids	lbs/day*	385,000	579,000
	mg/1	110	165
Settleable solids	ml/1	0.7	1.0
Oil and grease	lbs/day*	70,000	105,000
	mg/1	20	30

* Based on a design capacity of 420 mgd.

4. As ordered by the schedule of compliance in F-1 below, the discharge of an effluent in excess of the following limits for Discharge Seriai No. 002 is prohibited:

Parameter	Units	30-Day Average	7-Day Average	Daily Maximum
BOD_5 20°C	lbs/day*	105,000	158,000	210,000
	mg/1	30	45	—
Suspended solids	lbs/day*	105,000	158,000	210,000
	mg/1	30	45	—
Fecal coliform	MPN/100 ml	200	400	2,000
Oil and grease	lbs/day*	35,000	—	52,500
	mg/1	10	—	15
Settleable solids	ml/1	0.1	—	0.2
Turbidity	TU	50	—	75
Floating particulates	mg/1 (dry weight)	1.0	—	2.0

5. The discharge of an effluent from Discharge Serial Nos. 001 and 002 in excess of the following limits is prohibited:

Parameter	Units	30-Day Average	Maximum Daily
Arsenic	lbs/day*	35	70
	mg/1	0.01	0.02
Copper	lbs/day*	700	1050
	mg/1	0.2	0.3
Lead	lbs/day*	350	700
	mg/1	0.1	0.2

* Based on a design capacity of 420 mgd.

6. The discharge of an effluent from Discharge Serial Nos. 001 and 002 in excess of the following limits after July 1, 1978, is prohibited; provided, however, except as to residual chlorine, if it can be conclusively demonstrated by any discharger to ocean water tributaries that the treatment process required by Water Code Section 13379 (a and b), plus source control, will not result in complete compliance with the following limits by July 1, 1978, the Board and Regional Administrator may allow additional time for compliance not to exceed July 1, 1983:

Constituents	Discharge Rate (lbs/day)* 30-Day Average	Discharge Rate (lbs/day)* Daily Maximum	Concentration Limit(mg) 30-Day Average	Concentration Limit(mg) Daily Maximum
Silver	70	140	0.02	0.04
Cadmium	70	105	0.02	0.03
Total chromium	17.5	35	0.005	0.01
Mercury	3.5	7.0	0.001	0.002
Nickel	350	700	0.1	0.2
Zinc	1050	1750	0.3	0.5
Cyanide	350	700	0.1	0.2
Phenolic compounds (expressed as phenol)	1750	3500	0.5	1.0
Ammonia (expressed as nitrogen)	105,100	140,000	30.0	40.0
Total identifiable chlorinated hydrocarbons	7.0	14	0.002	0.004
Toxicity concentration	—	—	1.5 tu	2.0 tu
Residual chlorine	—	—	1.0	2.0

* Based on a design capacity of 420 mgd.

7. The discharge of an effluent in excess of the following limits from Discharge Serial No. 003 is prohibited:

Parameter	Units	30-Day Average	Maximum Daily
Total solids	lbs/day*	900,000	1,350,000
	mg/1	18,000	—

* Based upon a flow of 6.0 mgd.

8. The discharge of an effluent from Discharge Serial No. 003 in excess of the following limits after July 1, 1978, is prohibited; provided, however, except as to residual chlorine, if it can be conclusively demonstrated by any discharger to ocean water tributaries that the treatment process required by Water Code Section 13379 (a and b), plus source control, will not result

in complete compliance with the following limits by July 1, 1978, the Board and Regional Administrator may allow additional time for compliance not to exceed July 1, 1983:

Constituents	Discharge Rate (lbs/day)*		Concentration Limit(mg)	
	30-Day Average	Daily Maximum	30-Day Average	Daily Maximum
Arsenic	0.50	1.00	0.01	0.02
Cadmium	1.00	1.50	0.02	0.03
Total chromium	0.25	0.50	0.005	0.01
Copper	10.0	15.0	0.2	0.3
Lead	5.00	10.0	0.1	0.2
Mercury	0.05	0.10	0.001	0.002
Nickel	5.00	10.0	0.1	0.2
Silver	1.00	2.00	0.02	0.04
Zinc	15.0	25.0	0.3	0.5
Cyanide	5.00	10.0	0.1	0.2
Phenolic compounds (expressed as phenol)	25.0	50.0	0.5	1.0
Ammonia (expressed as nitrogen)	1,500	2,000	30	40
Total identifiable chlorinated hydrocarbons	0.10	0.20	0.002	0.004
Toxicity concentration	—	—	1.5(tu)	2.0(tu)
Residual chlorine	—	—	1.0	2.0

* Based upon a flow of 6 mgd.

9. The daily discharge rate shall be obtained from the following calculation for any calendar day:

$$\text{Daily discharge rate} = \frac{8.34}{N} \sum_{1}^{N} Q_i \cdot C_i$$

in which N is the number of samples analyzed in any calendar day. Q_i and C_i are the flow rate (MGD) and the constituent concentration (mg/1) respectively, which are associated with each of the N grab samples which may be taken in any calendar day. If a composite sample is taken, C_i is the concentration measured in the composite sample, and Q_i is the average flow rate occurring during the period over which samples are composited.

10. The 7-day and 30-day average discharge rates shall be the arithmetic average of all the values of daily discharge rate calculated using the results of analyses of all samples collected during any 7 and 30 consecutive calendar day periods, respectively. If fewer than four samples are collected and analyzed during any 30 consecutive calendar day period, compliance with the 30-day average discharge rate limitation shall not be determined. If fewer than three samples are collected and analyzed during any 7-day period, compliance with the 7-day average discharge rate limitation shall not be determined.

11. The 7-day, or 30-day, average concentration, other than the fecal coliform bacteria, means the arithmetic mean of measurements made during a 7, or 30, consecutive calendar day period, respectively. The 7-day, or 30-day, average concentration for fecal coliform bacteria means the geometric mean of measurements made during a 7, or 30, consecutive calendar day period, respectively. The geometric mean is the nth root of the product of n numbers.

12. For Discharge 001, the arithmetic mean of the BOD_5 and suspended solids values, by weight, for effluent samples collected in a period of 30 consecutive calendar days shall not exceed 15 percent of the arithmetic mean of the values, by weight, for influent samples collected at approximately the same times during the same period. For Discharge 002, compliance with this condition shall be as ordered by the compliance schedule in item F-1.

13. The pH of wastes discharged shall at all times be within the range 6.5 to 9.0.

14. The temperature of wastes discharged shall not exceed 100°F.

15. Radioactivity in the effluent shall not exceed the limits specified in Title 17, Section 5, Subchapter 4, Group 3, Article 3, Section 30269 of the California Administrative Code.

B. Discharge Prohibition

1. As ordered by the schedule of compliance in Provision F-1 below, the discharge of sludge through Discharge Serial No. 003 shall be terminated.

2. For the purposes of this Order, sludge shall be defined as scum, grit, screenings, and sludge collected from headworks and primary clarifiers; waste activated sludge collected from aeration units and secondary clarifiers; digested sludge collected from anaerobic digesters; and the solids fraction collected from sludge separation units or drying beds.

3. As used in this order, Phase I shall mean the facilities necessary to provide for the termination of no less than the first ⅓ of the sewage sludge presently discharged. Plase II shall mean the facilities necessary to provide for the termination of no less than an additional ⅓ of the sewage sludge presently discharged. Phase III shall mean the facilities necessary to provide for the termination of the discharge of the final portion of sewage.

c. The discharger shall comply with the schedule of compliance as outlined in Provision F-1 below to develop the "Regional Wastewater Solids Management Program-Los Angeles-Orange County Metropolitan Area" and implement the recommended program for ultimate disposal of wastewater solids.

D. Receiving Water Limitations

1. As ordered by the schedule of compliance as outlined in F-1 below, the discharge shall not cause the following limits to be exceeded after initial dilution after July 1, 1977:

Parameter	Units	Average	Maximum
Floating Particulates	mg dry weight/m²	1.0	1.5
Toxicity	Toxicity units	—	0.05
Grease and Oil	mg/m²	10	20

2. The wates discharged shall not cause receiving waters to contain any substance in concentrations toxic to human, animal, plant, or fish life.

3. Wastes discharged shall not cause the appearance of grease, oil or oily slick, or foam in the receiving waters.

4. Wastes discharged shall not cause the formation of sludge banks or deposits or create a nuisance due to odors or unsightliness along shores or beaches.

5. Wastes discharged shall not cause objectionable odors to emanate from the receiving waters.

6. No sewage solids or other physical evidence of waste discharge shall be visible at any time in the water or on beaches, shores, rocks, or structures.

7. The salinity of the receiving waters shall not be changed by the discharge to an extent such as to be harmful to desirable biota.

8. Nutrient materials contained in wastes discharged shall not cause objectionable aquatic growths or degrade indigenous biota.

9. Marine communities, including vertebrate, invertebrate, and plant species, shall not be degraded.

10. The pH of the receiving waters shall not be changed at any time by more than 0.2 pH units from that which occurs naturally outside the zone of initial dilution.

11. Wastes discharged shall not alter the color of the receiving waters nor create a visual contract with the natural appearance of the water.

12. Dissolved oxygen concentrations outside the zone of initial dilution shall not at any time be depressed more than 10 percent from that which occurs naturally excluding effect of upwelling.

13. The discharge shall not cause the following bacteriological limitations to be exceeded in the following areas:

    a. Within a zone bounded by the shoreline and a distance of 1,000 feet from the shoreline or the 30-foot depth contour, whichever is further from the shoreline, and in areas outside this zone used for body-contact sports, the following bacteriological objectives shall be maintained throughout the water column:

        Sample of water from each sampling station shall have a most probable number of coliform organisms less than 1,000 per 100 ml (10 per nl); provided that not more than 20 percent of the samples at any sampling station, in any 30-day period, may exceed 1,000 per 100 ml (10 per ml), and provided further that no single sample when verified by a repeat sample taken within 48 hours shall exceed 10,000 per 100 ml (100 per ml).

    b. At all areas where shellfish may be harvested for human consumption, the following bacteriological objectives shall be maintained throughout the water column:

        The median total coliform concentration shall not exceed 70 per 100 ml, and not more than 10 percent of the samples shall exceed 230 per 100 ml.

14. The transmittance of natural light shall not be significantly reduced at any point outside the initial dilution zone, such that the mean of sampling results for ayn consecutive 30-day period would be beyond one standard deviation of the mean determined for natural levels for the same period.

15. The concentration in marine sediments of substances listed in item A8 above shall not be significantly increased above that present under natural conditions.

16. The rate of deposition of inert solids and the characteristics of inert solids in ocean sediments shall not be changed such that benthic communities are degraded.

17. The concentration of organic materials in marine sediments shall not be increased above that which would degrade marine life.

18. The dissolved sulfide concentration of waters in and near sediments shall not be significantly increased above that present under natural conditions.

19. The natural taste, odor, and color of fish, shellfish, or other marine resources used for human consumption shall not be altered.

E. General Requirements

1. Neither the discharge nor any treatment of waste shall cause pollution or nuisance.

2. This discharge shall not cause a violation of any applicable water quality standard for receiving waters adopted by the Regional Board or the State Water Resource Control Board

as required by the Federal Water Pollution Control Act and regulations adopted thereunder. If more stringent applicable water quality standards are promulgated or approved pursuant to Section 303 of the Federal Water Pollution Control Act, or amendments thereto, the Board will revise and modify this Order in accordance with such more stringent standards.

3. Odors of sewage origin shall not be perceivable beyond the limits of the treatment plant.

4. Standby or emergency power facilities and/or storage capacity or other means shall be provided so that in the event of plant upset or outage due to power failure or other cause, discharge of raw or inadequately treated sewage does not occur.

5. The Board and Regional Administrator shall be notified immediately by telephone of the presence of adverse conditions in the receiving waters or on beaches and shores as a result of this discharge; written confirmation shall follow within 24 hours.

6. Any diversion from or bypass of facilities, including the waste collection system, necessary to maintain compliance with the terms and conditions of this permit is prohibited, except (a) where unavoidable to prevent loss of life or severe property damage, or (b) where excessive storm drainage or runoff would damage any facilities necessary for compliance with the effluent limitations and prohibitions of this permit. The permittee shall immediately notify the Board and the Regional Administrator by phone and in writing of each such diversion or bypass, in accordance with procedures outlined in the attached Standard Provisions. The written confirmation shall include information relative to the location, estimated

volume, date and time, duration, cause, and remedial measures taken to effect cleanup and/or to prevent recurrence. Immediate measures shall be initiated to clean up wastes due to any such bypass or diversion and to abate the effects thereof or, in the case of threatened pollution or nuisance, to take other necessary remedial action.

7. Notwithstanding E6, the bypassing of untreated waste to the ocean is prohibited.

F. Provisions

1. City of Los Angeles shall comply with the following time schedule to assure compliance with the effluent and receiving water limitations listed in items A-4, A-6, A-8, A-12, and D-1, the discharge prohibition of item B-1, and the ultimate disposal of sewage sludge provision of item C:

Task	Completion Date	Report of Compliance
A-4 and A-12:		
Complete draft facility plan	December 19, 1975	December 31, 1975
Progress report	July 1, 1976	July 15, 1976
Complete final plans and specifications	December 1, 1976	December 15, 1977
Award contract and begin construction	January 1, 1977	January 15, 1977
Progress reports	July 1, 1977 January 1, 1978 July 1, 1978 January 1, 1979	July 15, 1977 January 15, 1978 July 15, 1978 January 15, 1979
Complete construction	September 1, 1979	September 15, 1979
Operational level attained	October 1, 1979	October 15, 1979

Task	Completion Date	Report of Compliance
A-6 and A-8:		
Progress reports	January 1, 1976 July 1, 1976 January 1, 1977 July 1, 1977 January 1, 1978	January 15, 1976 July 15, 1976 January 15, 1977 July 15, 1977 January 15, 1978
Demonstration of compliance with effluent limitations	July 1, 1978	July 15, 1978
D-1		
Progress reports	January 1, 1976 July 1, 1976 January 1, 1977	January 15, 1976 July 15, 1976 January 15, 1977
Demonstration of compliance with limitations	July 1, 1977	July 15, 1977
B-1		
Completion of approvable plans and specifications for Phases I, II and III	not later than 6 months from date of concept approval	***
Award contract and begin construction	not later than 9 months from date of concept approval	***
Receive delivery of Phase I dewatering equipment	not later than 15 months from the date of conceptual approval, but in no case later than December 31, 1976	***
Complete construction of Phase I and achieve operational level	not later than 18 months from date of concept approval	***
Complete construction of Phase II and achieve operational level	not later than 24 months from date of concept approval	***
Complete construction of Phase III and achieve operational level	not later than 30 months from date of concept approval	***

*** report to be submitted within 15 days of date specified for completion of compliance schedule task.

Task	Completion Date	Report of Compliance
C		
Progress Reports on Program for Ultimate Disposal of Sludge	October 31, 1975 July 1, 1976 January 1, 1977 July 1, 1977 January 1, 1978	November 15, 1975 July 15, 1976 January 15, 1977 July 15, 1977 January 15, 1978
Submit a schedule for implementation of a program for ultimate disposal of wastewater solids	October 31, 1978	November 15, 1987

The discharger shall submit to the Board and the Regional Administrator on/or before each compliance report date, a report detailing his compliance or noncompliance with the specific schedule date and task.

If noncompliance is being reported, the reasons for such noncompliance shall be stated, plus an estimate of the date when the discharger will be in compliance. The discharger shall notify the Board and the Regional Administrator by letter when he has returned to compliance with the time schedule.

2. This Order includes the attached "Standard Provisions".

3. This Order includes items 1, 2, 3, and 4 of the attached "Reporting Requirements".

4. This Order includes the attached "General Monitoring and Reporting Provisions".

5. This Order expires on February 1, 1977, and City of Los Angeles must file a Report of Waste Discharge in accordance with Title 23, California Administrative Code, not later than 180 days in advance of such date as application for issuance of new waste discharge requirements.

6. A copy of these waste discharge specifications shall be maintained at the discharge facility so as to be available at all times to operating personnel.

7. In the event of any change in name, ownership, or control of these waste disposal facilities, the discharger shall notify the Board and the Regional Administrator, of such change and shall notify the succeeding owner or operator of the existence of this order by letter, copy of which shall be forwarded to the Board and the Regional Administrator.

8. Any discharge of wastes at any point(s) other than specifically described in this permit is prohibited, and constitutes a violation of the permit.

9. The discharger shall file a comprehensive report with the Board and Regional Administrator by November 19, 1975, detailing measures to be taken to control inflow and infiltration into the Hyperion system. Included shall be an implementation schedule outlining specific tasks and dates to mitigate inflow and infiltration.

10. Order No. 74-329 and NPDES permit number CA0109991, issued November 18, 1974, are hereby rescinded.

11. This Order does not alleviate the responsibility to obtain other necessary local, state and federal permits to construct facilities necessary for compliance with this Order; nor does this Order prevent imposition of additional standards, requirements, or conditions by any other regulatory agency.

This certifies that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, Los Angeles Region, and of a National Pollutant Discharge Elimination System permit issued by the Environmental Protection Agency,

Region IX. The order and permit shall become effective 30 days from the date of signature.

/s/ Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

Date: August 18, 1975

/s/ Richard L. O'Connell
RICHARD L. O'CONNELL
Director,
Enforcement Division,
for the Regional
Administrator

Date: August 18, 1975

STANDARD PROVISIONS

1. The requirements prescribed herein do not authorize the commission of any act causing injury to the property of another, nor protect the discharger from his liabilities under federal, state, or local laws, nor guarantee the discharger a capacity right in the receiving waters.
2. The discharge of any radiological, chemical, or biological warfare agent or high level radiological waste is prohibited.
3. The discharger shall require any industrial user of the treatment works to comply with applicable service charges and toxic and pretreatment standards promulgated in accordance with Sections 204(b), 307, and 308 of the Federal Water Pollution Control Act or amendments thereto. The discharger shall require each individual user to submit periodic notice (over intervals not to exceed nine months) of progress toward compliance with applicable toxic standards developed pursuant to the Federal Water Pollution Control Act or amendments thereto. The discharger shall forward a copy of such notice to the Board and the Regional Administrator.
4. The discharger shall permit the Regional Board, the Regional Administrator, or their authorized representatives:
   (a) Entry upon premises in which an effluent source is located or in which any required records are kept;
   (b) Access to copy any records required to be kept under terms and conditions of this Order;
   (c) Inspection of monitoring equipment or records, and
   (d) Samping of any discharge.
5. All discharges authorized by this Order shall be consistent with the terms and conditions of this Order.

The discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this Order shall constitute a violation of the terms and conditions of this Order.

6. The discharger shall maintain in good working order and operate as efficiently as possible any facility or control system installed by the discharger to achieve compliance with the waste discharge requirements.
7. Collected screenings, sludges, and other solids removed from liquid wastes shall be disposed of at a legal point of disposal, and in accordance with the provisions of Division 7.5 of the California Water Code. For the purpose of this requirement, a legal point of disposal is defined as one for which waste discharge requirements have been prescribed by a regional water quality control board and which is in full compliance therewith. This provision does not apply to the sludge discharge through outfall serial No. 003.
8. After notice and opportunity for a hearing, this Order may be terminated or modified for cause, including, but not limited to:
   (a) Violation of any term or condition contained in this Order;
   (b) Obtaining this Order by misrepresentation, or failure to disclose all relevant facts;
   (c) A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.
9. If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Federal Water Pollution Control Act, or amendments thereto, for a toxic pollutant which is present in the discharge authorized herein and such standard or prohibition is more stringent than any limitation upon such pollutant in this Order, the Board and the Regional Administrator will revise or

modify this Order in accordance with such toxic effluent standard or prohibition and so notify the discharger.

10. There shall be no discharge of harmful quantities of oil or hazardous substances, as specified by regulation adopted pursuant to Section 311 of the Federal Water Pollution Control Act, or amendments thereto.

11. In the event the discharger is unable to comply with any of the conditions of this Order due to:

    (a) breakdown of waste treatment equipment;

    (b) accidents caused by human error or negligence; or

    (c) other causes such as acts of nature,

    the discharger shall notify the Executive Officer and the Regional Administrator by telephone as soon as he or his agents have knowledge of the incident and confirm this notification in writing within two weeks of the telephone notification. The written notification shall include pertinent information explaining reasons for the non-compliance and shall indicate what steps were taken to correct the problem and the dates thereof, and what steps are being taken to prevent the problem from recurring.

12. *Pretreatment of Industrial Wastewaters*

    (a) Submittal of Information

    The discharger shall submit to the Board and the Regional Administrator:

    (1) not later than December 18, 1975, the information described in Section IV of EPA Form 7550-22 for each major contributing industry;

    (2) at least thirty days prior to its initiation, notification of any new introduction of pollutants from sources which, if they were to discharge to the waters

of the United States, including the territorial seas, would be

(a) a new source as defined in Section 306 of the Act, or

(b) a major contributing industry subject to Section 301 of the Act. The notification in (a) & (b) above shall include the information described in Section IV of EPA Form 7550-22;

(3) notification of any substantial change in volume or character of pollutants discharged by an existing source. Such notice shall include the information described in Section IV of EPA Form 7550-22 and the anticipated impact, if any, on the quality or quantity of effluent discharged from the discharger's facility.

After receipt and review of such information, the Board or the Regional Administrator may revise or modify the conditions of this order including any necessary effluent limitations for any pollutants not identified and limited herein.

(b) Control of Industrial Pollutants

(1) The discharger shall require all industrial users of its treatment works to comply with the requirements of Section 204 (b), if applicable, and Section 307 of the Act. All existing major contributing industries shall be required to comply with pretreatment standards for prohibited wastes and incompatible pollutants within the shortest reasonable time but not later than three years from the date of their promulgation. New industrial sources shall be required to comply with pretreatment standards promulgated pursuant to Sec-

tion 307(c) of the Act upon initiation of their discharge to the discharger's facilities.

(2) The discharger shall by December 18, 1975, submit to the Board and the Regional Administrator for each major contributing industry either (a) evidence of compliance with pretreatment standards promulgated pursuant to Section 307(b) of the Act, or (b) a report, on a form to be furnished by the Administrator which shall set forth the effluent limits to be achieved and an implementation schedule for the achievement of compliance by the required date. Such implementation schedules shall in every case provide for the initiation of any needed construction of pretreatment facilities within 18 months of the date of promulgation of applicable pretreatment standards.

(c) Compliance Monitoring

(1) The discharger shall monitor the compliance of all affected sources with the provisions of this condition and shall submit quarterly reports on the status of such compliance to the Board and the Regional Administrator. These quarterly compliance reports shall cover the same periods and shall be submitted on the same schedule as the monitoring reports required by this order beginning by December 18, 1975.

(2) The discharger shall report quarterly to the Board and the Regional Administrator each instance of compliance or noncompliance by an affected source with the provisions of implementation

schedules submitted as required by subparagraph b. of this condition.

(3) The wastewater flow of each affected source that is not covered by a current implementation schedule shall be monitored by the discharger or at the direction of the discharger by the source, or by both, in such a manner and frequency so as to produce information that will demonstrate to the satisfaction of the Board and the Regional Administrator compliance or noncompliance with the pretreatment standards applicable to such source. Such monitoring shall comply with the monitoring requirements of this order. The results of such monitoring shall be reported by the discharger on the Discharge Monitoring Report Form and shall be included in the quarterly compliance report described in 1. above.

(d) Definitions

(1) An "industry" means any facility identified in the Standard Industrial Classification Manual, 1972, Office of Management and Budget, as amended and supplemented, under the following divisions:

a) Division A—Agriculture, Forestry, and Fishing;

b) Division B—Mining;

c) Division D—Manufacturing;

d) Division E—Transportation, Communications, Electric, Gas, and Sanitary Services;

e) Division I—Services.

A facility in the Divisions listed may be excluded if it is determined by the Board and the Regional Administrator that it introduces primarily domestic waste or wastes from sanitary conveniences.

(2) A "major contributing industry" means one that: (1) has a flow of 50,000 gallons or more per average work day; (2) has a flow greater than five percent of the flow carried by the municipal system receiving the waste; (3) has in its waste a toxic pollutant in toxic amounts as defined in standards issued under Section 307 (a) of the Act; or (4) is found by the Board or the Regional Administrator to have significant impact, either singly or in combination with other contributing industries, on the treatment works or the quality of its effluent.

(2) A "treatment works" means any facility, method or system for the storage, treatment, recycling, or reclamation of municipal sewage or industrial wastes of a liquid nature, including waste in combined storm water and sanitary sewer systems.

(4) "Prohibited wastes" means any of the following wastes, which shall not be introduced into the treatment works:

a) Wastes which create a fire or explosion hazard in the treatment works;

b) Wastes which will cause corrosive structural damage to treatment works, but in no case wastes with a pH lower than 5.0 unless the works

is designed to accommodate such wastes;

c) Solid or viscous wastes in amounts which would cause obstruction to the flow in sewers, or other interference with the proper operation of the treatment works; or

d) Wastes at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so that there is a treatment process upset and subsequent loss of treatment efficiency.

(5) An "incompatible pollutant" means any pollutant which is not a compatible pollutant.

(6) A "compatible pollutant" means biochemical oxygen demand suspended solids, pH and fecal coliform bacteria, plus additional pollutants identified as compatible in this permit if the treatment works was designed to treat such pollutants, and in fact does remove such pollutants to a substantial degree.

13. *Growth—Related Conditions*

(a) Step 1.—Warning Notice

Should there be a violation of any condition of this order the Board or the Regional Administrator pursuant to Section 402(h) of the Act may proceed in a court of competent jurisdiction to restrict or prohibit further connections to the discharge's treatment works by any sources not utilizing the treatment works prior to the finding that such a condition was violated.

(b) Step 2.—Initial Planning Actions

Not later than December 18, 1975, the discharger shall submit to the Board and the

Regional Administrator a report on progress in the development of a long-range plan which will assure the prevention of hydraulic overload or inadequate treatment capacity of the discharger's treatment works. The report shall be revised and submitted to the Board and the Regional Administrator not less frequently than at twelve month intervals thereafter.

The long-range plan shall include but is not limited to the following considerations:

(1) a land use and pollution strategry to achieve a balance between increased wasteload generation and treatment capacity;

(2) Community review of developments which increase wasteload generation such as subdivision approvals, building permits and zoning changes; and,

(3) development of local legal authority to enact ordinances, amend zoning regulations, modify subdivision requirements and building codes, or other appropriate measures to assure the prevention of hydraulic overload or inadequate treatment capacity.

(c) Step 3.—Comprehensive Planning and Management System

Within 60 days of the effective date of this Order the discharger shall submit to the Board and the Regional Administrator a schedule of anticipated new extensions and connections of new sources of wasteload to the discharger's treatment works for the period ending with the expiration date of this order.

The schedule shall be consistent with applicable land use plans, open space plans, zoning

maps, capital improvement budgets, and other appropriate planning and management constraints. Beginning not later than one year after submittal of the schedule, the discharger shall submit to the Board and the Regional Administrator an annual report which contains revisions of the schedule, if any, and compares the rate of actual extensions and connections with the schedule.

In addition, within 30 days of the effective date of this Order, the discharger shall submit to the Board and the Regional Administrator a proposed program of public notice including quarterly summary reports which inform users of the discharger's treatment works and local government officials of the extent of compliance achieved with the conditions of this order. Thereafter, the discharger shall initiate the program 30 days after approval of the Board and the Regional Administrator including in said implementation any additions or modifications which the Board or the Regional Administrator may make in approving the program.

14. Nothing in this order shall be construed to relieve the discharger from civil or criminal penalties for noncompliance.

15. The Board and the Regional Administrator may upon request of the discharger, and after public notice, revise or modify any schedule of compliance in this order if they determine good and valid cause (such as an act of God, strike, flood, materials shortage, or other event over which the discharger has little or no control) exists for such revision.

REPORTING REQUIREMENTS

1. The discharger shall file with the Board and the Regional Administrator technical reports on self-monitoring work performed according to the detailed specifications contained in any Monitoring and Reporting Programs as directed by the Executive Officer.

2. The discharger shall file a written report with the Board and the Regional Administrator within 90 days after the average dry-weather waste flow for any month equals or exceeds 75 percent of the design capacity of his waste treatment and/or disposal facilities. The discharger's senior administrative officer shall sign a letter which transmits that report and certifies that the policy-making body is adequately informed about it. The report shall include:

   Average daily flow for the month, the date on which the instanteous peak flow occurred, the rate of that peak flow, and the total flow for that day.

   The discharger's best estimate of when the average daily dry-weather flow rate will equal or exceed the design capacity of his facilities.

   The discharger's intended schedule for studies, design, and other steps needed to provide additional capacity for his waste treatment and/or disposal facilities before the waste flow rate equals the capacity of present units. (Reference: Sections 13260, 13267(b), and 13268, California Water Code.)

3. The discharger shall notify the Board and the Regional Administrator of (a) new introduction into such works of pollutants from a source which would be a new source as defined in Section 306 of the Federal Water Pollution Control Act, or amendments thereto, if such source were discharging pollutants to the waters of the United States, (b) new introductions of pollutants into such works from a source which would be subject to Section 301 of the Federal Water Pollution Control Act, or amendments thereto,

if it were discharging such pollutants to the waters of the United States, (c) a substantial change in the volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time the waste discharge requirements were adopted. Notice shall include a description of the quantity and quality of pollutants and the impact of such change on the quantity and quality of effluent from such publicly owned treatment works. A substantial change in volume is considered an increase of ten percent in the mean dry-weather flow rate.

4. The discharger shall file with the Board and the Regional Administrator a report on waste discharge at least 120 days before making any material change or proposed change in the character, location or volume of the discharge.

5. The discharge shall file with the Board and the Regional Administrator, within 90 days after the effective date of this Order, a technical report on his preventive (fail-safe) and contingency (cleanup) plans for controlling accidental discharges, and for minimizing the effect of such events. The technical report should:

   Identify the possible sources of accidental loss, untreated waste bypass, and contaminated drainage. Loading and storage areas, power outage, waste treatment unit outage, and failure of process equipment, tanks and pipes should be considered. Evaluate the effectiveness of present facilities and procedures and state when they became operational. Describe facilities and procedures needed for effective preventive and contingency plans.

   Predict the effectiveness of the proposed facilities and procedures and provide an implementation schedule containing interim and final dates when they will be constructed, implemented, or operational. (Reference: Sections 13267(b) and 13268, California Water Code.)

The Board, or the Regional Administrator after review of the technical report, may establish conditions which it deems necessary to control accidental discharges and to minimize the effects of such events. Such conditions may be incorporated as part of this Order, upon notice to the discharger.

6. The discharger shall submit to the Board, and the Regional Administrator by January 30 of each year, an annual summary of the quantities of all chemicals, listed by both trade and chemical names, which are used for cooling and/or boiler water treatment and which are discharged.

7. The discharger shall submit to the Board, and Regional Administrator together with the first monitoring report required by this permit, a list of all chemicals and proprietary additives which could affect this waste discharge, including quantities of each. Any subsequent changes in types and/or quantities shall be reported promptly.

8. Not later than 6 months from the effective date of this order and permit the discharger shall submit to the Board and the Regional Administrator a work plan and schedule of compliance to achieve a demonstration that the discharger complies with Section 403 of the Federal Water Pollution Control Act.

   Upon approval of the Board and the Regional Administrator, the interim and final dates contained in the schedule shall become conditions of this Order. Approval may include additions or modifications to the schedule.

GENERAL MONITORING AND REPORTING PROVISIONS

GENERAL PROVISIONS FOR SAMPLING AND ANALYSIS

Unless otherwiste noted, all sampling, samples preservation, and analyses shall be conducted in accordance with the current edition of "Standard Methods for the Examination of Water and Wastewater" or as approved by the Executive Officer and the Regional Administrator.

All analyses shall be performed in a laboratory approved by the Executive Officer or certified to perform such analyses by the California State Department of Public Health.

Effluent samples shall be taken downstream of any addition to the treatment works and prior to mixing with the receiving waters.

The discharger shall calibrate and perform maintenance procedures on all monitoring instruments and equipment to insure accuracy of measurements, or shall insure that both activities will be conducted.

A grab sample is defined as an individual sample collected in fewer than 15 minutes.

A composite sample is defined as a combination of no fewer than eight individual samples obtained over the specified sampling period. The volume of each individual sample is proportional to the discharge flow rate at the time of sampling. The sampling period shall equal the discharge period, or 24 hours, whichever period is shorter.

GENERAL PROVISIONS FOR REPORTING

For every item where the requirements are not met, the discharger shall submit a statement of the actions undertaken or proposed which will bring the discharge into full compliance with requirements at the earliest time

and submit a time table for correction to the Board and the Regional Administrator.

By February 28 of each year, the discharger shall submit an annual report to the Board and the Regional Administrator. The report shall contain both tabular and graphical summaries of the monitoring data obtained during the previous year. In addition, the discharger shall discuss the compliance record and the corrective actions taken or planned which may be needed to bring the discharge into full compliance with the waste discharge requirements.

The discharger shall maintain all sampling and analytical results, including strip charts; date, exact place, and time of sampling; date analyses were performed; analyst's name; analytical techniques used; and results of all analyses. Such records shall be retained for a minimum of three years. This period of retention shall be extended during the course of any unresolved litigation regarding this discharge or when requested by the Board or the Regional Administrator.

Monitoring reports shall be signed by:

a. In the case of corporations, by a principal executive officer at least of the level of vice-president or his duly authorized representative, if such representative is responsible for the overall operation of the facility from which discharge originates;

b. In the case of a partnership, by a general partner;

c. In the case of a sole proprietorship, by the proprietor;

d. In the case of municipal, state or other public facility, by either a principal executive officer, ranking elected official, or other duly authorized employee.

The discharger shall mail an originally signed copy of each monitoring report and of all other reports required by this order to each of the following:

Regional Administrator
Environmental Protection
Agency
Region IX
Attention: ENCMR
100 California Street
San Francisco, CA 94111

California Regional Water
Quality Control Board,
Los Angeles Region
107 South Broadway
Los Angeles, CA 90012
Attention: Executive Officer

Each report shall contain the following completed declaration:

"I declare under penalty of perjury that the foregoing is true and correct

Executed on the — day of ——— at ————————.

———————————— (Signature)

———————————— (Title)"

In reporting the monitoring data, the discharger shall arrange the data in tabular form so that the date, the constituents, and the concentrations are readily discernible. The date shall be summarized to demonstrate compliance with waste discharge requirements, and, where applicable, shall include results of receiving water observations.

If the discharger monitors the discharge more frequently than required by this order, using approved analytical methods as specified herein, the results of such monitoring shall be included in the calculation and reporting of the values required in the monitoring report. Such increased frequency shall also be indicated in the monitoring report.

Monitoring, analytical, and reporting requirements may be modified by the Board or the Regional Administrator upon due notice.

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD
LOS ANGELES REGION
MONITORING AND REPORTING PROGRAM
NO. 1492
FOR
City of Los Angeles
Hyperion Treatment Plant
(CA0109991)

A. *Location of Sampling Stations*

1. A sampling station shall be established for each point of discharge and shall be located where representative samples of the effluent can be obtained. These stations shall be designated as Discharge Serial Nos. 001, 002, and 003, respectively.

2. Offshore stations shall be established along eight traverses radiating outward from a point of origin which shall be the center of the five-mile effluent outfall diffuser pattern (approximately at Latitude 33° 54′ 30″ N and Longitude 118° 31′ 30″ W).

These traverses shall proceed radially outward from that point of origin on bearings referenced to true north, as follows:

Traverse 1	North
" 2	N 45° E
" 3	East
" 4	S 45° E
" 5	South
" 6	S 45° W
" 7	West
" 8	N 45° W

The offshore stations shall be located along these traverses at the following distances from the origin:

For Traverse 1:

Station 1A	7,500 feet
" 1B	20,000 "

For Traverse 2:

Station 2A	6,000 feet
" 2B	15,000 "

For Traverse 3:

Station 3A	6,500 feet
" 3B	15,000 "

For Traverse 4:

Station 4A	6,000 feet
" 4B	20,000 "
" 4C	35,000 "

For Traverse 5:

Station 5A	7,000 feet
" 5B	20,000 "
" 5C	35,000 "

For Traverse 6:

Station 6A	7,000 feet
" 6B	20,000 "

For Traverse 7:

Station 7A	5,000 feet
" 7B	20,000 "

For Traverse 8:

Station 8A	7,000 feet
" 8B	20,000 "
" 8C	35,000 "

In addition to the above, a control station (Station OC) shall be established at a location 6,000 feet offshore from Las Tunas Beach (34° 1′ 20.3″ N, 118° 36′ W).

The offshore stations shall be located by means of radar navigation; other means may be utilized if in the judgment of the Executive Officer they are of sufficient accuracy to permit reoccupation of the stations within a reasonable distance.

3. Eight nearshore stations shall be established, in order to facilitate commutation by boat, at a distance of 3,000 feet from the shoreline, as follows:

Station	Location
N1	Off Las Tunas Beach (34° 1′ 50.3″N, 118° 36′W)
N2	Along Traverse 1 and 40,000 feet from the origin
N3	Offshore from Ocean Park tower, Santa Monica
N4	Along Traverse 2 and 25,000 feet from the origin
N5	Offshore from Shore Station S 34.8 (see below)
N6	Along Traverse 3 and 28,000 feet from the origin
N7	Off Municipal Pier, Manhattan Beach
N8	Due west from northerly stack, near north end of King Harbor, Redondo Beach

4. Seventeen shore stations shall be established as follows:

Station	Location
S21.7	Extension of Big Rock Road at 19543 Pacific Coast Highway, Malibu
S23.6	1,000′ east of Topanga Canyon Blvd., east side of The Point Restaurant, Malibu
S25.6	East side of Bel Air Bay Club, Pacific Palisades
S27.5	Extension of San Vicente Blvd., Santa Monica-300′ SE of abandoned pilings at Santa Monica Beach State Park
S28.5	400′ SW of Wilshire Blvd., Santa Monica State Beach Park (NW of end of breakwater)
S29.6	Strand Street extended, Santa Monica
S31.3	Venice Blvd. extended, Venice Beach
S32.4	Northstar Street extended, Venice Beach
S33.7	Surf Street, north side of Westport Beach Club, Playa Del Rey
S34.8	Epinard Street extended, Playa Del Rey
S35.8	Opposite Hyperion East Headworks, 1,100′ north of one-mile submarine outfall
S37.4	45th Street extended, Manhattan Beach State Park
S39.3	6th Street extended, Manhattan Beach State Park
S40.6	South side of Municipal Pier, Hermosa Beach
S42.5	Pearl Street extended, south side of Redondo Park, Redondo Beach
S43.7	Avenue I extended, Redondo Beach
S45.0	Extension of Arroyo Circle, Malaga Cove, Palos Verdes Estates

5. Three diving stations shall be established at the main termini of the one-mile and 5-mile effluent outfalls and on the shelf above the submarine canyon in which the sludge outfall terminates; these shall be designated D1, D2 and D3, respectively.

6. Eight inshore diving stations shall be established on transects normal to the shoreline at the eight nearshore stations, at a depth of 80 feet.

B. *Type and Frequency of Sampling and Analysis*

1. Effluent Monitoring

Parameter	Discharge Serial No.	Units	Type of Sample	Minimum Frequency of Analysis
Flow	001,002,003	mgd	continuous	——
Temperature	001,002,003	°F	grab	twice daily
BOD_5 20°C	001,002	mg/l	24-hr. composite	daily
Suspended solids	001,002	mg/l	24-hr. composite	daily
Coliform group	001,002	MPN/10Col	grab	daily
Fecal coliform	001,002	MPN/10Col	grab	daily
pH	001,002,003	pH units	grab	daily
Oil and grease [1]	001,002,003	mg/l	grab	daily
Settleable solids	001,002	ml/l	grab	once every 8 hours
Arsenic	001,002,003	mg/l	24-hr. composite	monthly
Cadmium	001,002,003	mg/l	24-hr. composite	monthly
Chromium	001,002,003	mg/l	24-hr. composite	monthly
Copper	001,002,003	mg/l	24-hr. composite	monthly
Lead	001,002,003	mg/l	24-hr. composite	monthly
Mercury [2]	001,002,003	mg/l	24-hr. composite	monthly
Nickel	001,002,003	mg/l	24-hr. composite	monthly
Silver	001,002,003	mg/l	24-hr. composite	monthly
Zinc	001,002,003	mg/l	24-hr. composite	monthly

Parameter	Discharge Serial No.	Units	Type of Sample	Minimum Frequency of Analysis
Cyanide	001,002,003	mg/1	24-hr. composite	monthly
Solenium	001,002,003	mg/1	24-hr. composite	monthly
Phenolic compounds	001,002,003	mg/1	24-hr. composite	monthly
Total chlorine residual [3]	001,002	mg/1	continuous	———
Total identifiable chlorinated hydrocarbons	001,002,003	mg/1	24-hr. composite	monthly
Toxicity concentration	001,002	Toxicity units	24-hr. composite	monthly
Radioactivity	001,002,003	PCi/ml [4] PCi/kg [5]	24-hr. composite	monthly
Polychlorinated biphenyls	001,002,003	mg/1	24-hr. composite	monthly
Nitrate nitrogen [6]	001,002	mg/1	24-hr. composite	monthly
Nitrate nitrogen	001,002	mg/1	24-hr. composite	monthly
Amonia nitrogen [7]	001,002	mg/1	24-hr. composite	monthly
Organic nitrogen	001,002,003	mg/1	24-hr. composite	monthly
Detergents (as methylene blue-active substances, MBAS)	001,002	mg/1	24-hr. composite	monthly
Total phosphorus (as P)	001,002,003	mg/1	24-hr. composite	monthly
Total solids	003	mg/1	24-hr. composite	daily

Total volatile solids	003	mg/1	24-hr. composite	monthly
Saponifiable grease	003	mg/1	24-hr. composite	monthly
Floating particulates	001,002	mg/1	24-hr. composite	monthly
2. Influent Monitoring		dry weight		
Flow	——	mgd	———	——
BOD_5 20°C	——	mg/1	24-hr. composite	daily
Suspended solids	——		24-hr. composite	daily

[1] By the trichlorotrifluoroethane extraction method.

[2] By flameless atomic absorption.

[3] By the iodometric method, with the end point determined amperometrically or visually; continuous analysis is required only during periods of chlorination. The discharger shall have the necessary equipment installed prior to October 1, 1975.

[4] For sewage.

[5] For sludge.

[6] By the cadmium reduction or brucine sulfate method.

[7] By distillation—nesslerization or titration automated phenolate (EPA Methods), pp. 134, 141.

3. *Receiving Water Monitoring*

a. Offshore sampling stations shall be occupied at least once each week between the hours of 7 a.m. and 6 p.m. Samples shall be taken at a depth of one to three feet. In the event of stormy weather that makes sampling hazardous or impractical, these samples can be omitted provided that such omissions do not occur in consecutive weeks or in more than four weeks in any calendar year. The following determinations shall be made at each station:

(1) Dissolved oxygen

(2) Grease

(3) Temperature

(4) Transparency

(5) Floating particulates (surface sample only—quarterly monitoring only)

b. Once each month, on a day when samples are taken as specified in 3-a above, samples shall also be obtained at each offshore station at depths of 20 feet, 50 feet, and approximately 10 feet below the thermocline (if the latter two stations lie within 10 feet of each other, the 50-foot station may be omitted), and the following determinations made:

(1) Dissolved oxygen

(2) Temperature

(3) Grease (sub-thermocline samples only)

c. Once each month a determination of water turbidity shall be made at each offshore station at the 5′, 10′, 20′, and 50′ depths, and approximately 10 feet below the thermocline.

d. Once every six months bottom samples shall be obtained at each offshore station for determination of content of organic matter, as a

percent of total dry solids. These bottom samples shall be taken by means of a Shipek, Petersen, or "orange-peel" dredge or an equivalent device having an open sampling area of not less than 60 square inches. Five bottom samples shall be obtained at each station and composited for analysis.

e. Once every six months bottom samples shall be obtained at each offshore station for determinations of thickness of the sludge layer, if any. These samples shall be taken by means similar to those specified for core samples in 3-a. above. Sludge thickness shall be determined by direct measurement to the nearest millimeter. To the extent practicable, a photographic record shall be made of each core.

f. Once every six months bottom samples shall be obtained at each of the offshore stations for biological examination and determination of biomass and diversity. One of these samplings shall be made during the summer season. The samples shall be collected with Shipek, Petersen, "orange-peel" or equivalent type dredge having an open sampling area of not less than 60 square inches. Not less than four samples shall be taken at each station and each shall be processed and analyzed separately.

g. For biomass, the volume and wet weight retained on a one millimeter screen per unit volume of sediment shall be determined. The animals representing at least ten percent of the total population shall be enumerated and identified as to genus (and species if possible).

h. An annual diving survey shall be made. This shall consist of:

(1) An inspection and coring at and in the vicinity of each diving station to deter-

mine thickness of sludge layer, presence and thickness of any "cloud" of unsettled solids, and bottom flora and fauna. A photographic record shall be made of the results of this inspection.

(2) An examination of each outfall and diffuser port system for leaks and flow distribution.

i. At intervals of five years or less, beginning in 1971, an inspection shall be made at the terminus of the sludge outfall and in the vicinity, to determine thickness of sludge layer, presence and thickness of any "cloud" of unsettled solids, and bottom flora and fauna. A photographic record shall be made of the results of this inspection. This inspection may be made by diving, by submarine, or by other suitable means.

j. Nearshore sampling stations shall be occupied once each week between the hours of 7 a.m. and 6 p.m. Samples shall be taken at a depth of one to three feet. In the event of stormy weather that makes sampling hazardous or impractical, these samples can be omitted provided that such omissions do not occur in consecutive weeks or in more than four weeks in any calendar year. The following determinations shall be made at each station:

(1) Dissolved oxygen

(2) Coliform

(3) Transparency

(4) Temperature

k. Once every six months (summer and winter) the blue light energy shall be measured at nearshore stations N1 and N2 at a water depth of 50 feet (or 5′ above the bottom if

shallower than 55 feet). This measurement shall be made:

(1) With a photometer fitted with a cosine collecting device and a blue filter having 50 percent transmission values at 450 and 650 millimicrons;

(2) In units of ergs/cm^2/day;

(3) Between 10 a.m. and 2 p.m. when the sun is not obscured by clouds (a slight haze is permissible).

l. Shore stations shall be sampled on a daily frequency, and the samples shall be analyzed for coliform organisms, most probable number (MPN).

m. At the time samples are collected of the waters of Pacific Ocean (shore, nearshore and offshore stations) observations shall be made and recorded of conditions of wind, weather, and tide. Observations shall also be made and recorded of water color, turbidity, odor, and of floating or suspended matter in the water or on the beach, rocks and jetties or beach structures. The character and extent of such matter shall be described.

n. The inshore diving stations shall be occupied at six-month intervals and the following determinations made: Thickness of organic-laden sediment and composition of substrate; general condition of ocean floor; water temperature and clarity; benthos; and fish count.

C. *Techniques of Sampling and Analyzing*

1. All samples shall be taken and all analyses shall be performed in accordance with the latest edition of "Standard Methods for the Examination of Water and Wastewater", published by the American Public Health Association, Inc., except

that for specific analyses newer techniques may be used if in the judgment of the Executive Officer the results obtained are consistent with the objectives of these waste discharge requirements. Tests for most probable number (MPN) of coliform organisms will be the confirmed test using at least three tubes per dilution and sufficient dilutions to permit determination of the upper and lower MPN limits from standard tables.

2. Those personnel involved in sampling and analysis shall be well trained to accomplish those functions. Sampling and analytical apparatus shall be appropriate to the task and in good working order.

3. Transparency measurements shall be made with a Secchi disc. A Secchi disc is a circular plate, having a standard diameter of 30 centimeters, the top side of which is white. The disc is lowered in the water until the disc is just perceptible, and the depth in feet reported.

4. Turbidity shall be determined by means of a turbidity meter, using equipment and procedure similar to that described by L. V. Whitney, "Transmission of Solar Energy and the Scattering Produced by Suspensoids in Lake Waters", Transactions of the Wisconsin Academy of Sciences, Arts, and Letters, Vol. 31 (1938). Results shall be expressed as the percent of light attenuation per meter of sea water, as compared to a standard of distilled water.

5. Procedures for determination of acute toxicity of the waste using bioassay techniques shall be as specified in the latest edition of "Standard Methods for the Examination of Water and Wastewater", by American Public Health Association et al. Particular attention shall be directed to the selection and preparation of test animals so that the response of biota in the marine environment is accurately measured. Test species selec-

tions shall be submitted to the Executive Officer for advance approval. The duration of the tests shall be 96 hours. Modifications of procedures outlined in "Standard Methods" shall be only as approved in advance by the Executive Officer of this Board.

6. Radioactivity determinations of gross bets activity shall be made within 48 hours following preparation of composite samples. The over-all efficiency of the counting system, size of sample and counting time shall be such that radioactivity can be determined to a sensitivity of ten picocuries per liter (pc/l) for sewage and ten picocuries per gram for sludge, with a 95% confidence limit not to exceed 50 percent.

7. Inshore diving station examinations shall be made in accordance with methods described by Turner, Ebert, and Given, California Fish and Game, Vol. 52, No. 1 (1966).

D. *Filing of Reports*

1. One copy of a written report of the results of the monitoring program shall be submitted to the Board and one copy to the Regional Administrator for each month by the first day of the second following month, beginning not later than November 1, 1975.

2. Each written report shall contain the following information:

   a. Dates and times of sampling and observations;

   b. Weather conditions during sampling;

   c. Average and peak daily volume of wastes discharged during the report period;

   d. Tabulated results of specified analyses and physical observations, including the monthly mean and range for each effluent parameter reported;

e. Depth of thermocline;

f. In addition to reporting the most probable number of coliform organisms obtained from samples collected from shore and nearshore stations, the running median of the latest 6-month period shall also be determined and reported. Coliform data obtained during or within 48 hours following a rainstorm shall not be used in determining medians.

g. In reporting the results of analyses for acute toxicity, the following shall be reported for each analysis:

(1) Median tolerance limit (96 hour test);

(2) A concise statement or table of the experimental data on which median tolerance limit data are based; that is, the number and species of test organisms used and the recorded percentages of survival at each tested concentration. This table shall also include such data for the controls used;

(3) The total number of test animals used in each analysis shall be reported along with the number of test animals surviving after 24 hours, 48 hours, and 96 hours;

(4) The species used in each test.

h. In reporting the data on blue light energy (Item B3j) the measurement depths shall be reported.

State of California
Resources Agency
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,
LOS ANGELES REGION

Order No. 75-165

NPDES No. CA0109991

WASTE DISCHARGE REQUIREMENTS FOR CITY OF LOS ANGELES HYPERION TREATMENT PLANT

The California Regional Water Quality Control Board, Los Angeles Region finds that:

1. City of Los Angeles discharges wastes from the Hyperion Treatment Plant under waste discharge requirements and a National Pollutant Discharge Elimination System (NPDES) Permit contained in Order No. 75-100 jointly adopted by this Board and issued by the Environmental Protection Agency on August 18, 1975.

2. Order No. 75-100 and the NPDES Permit contain a time schedule for prohibition of the sludge discharge. The time schedule is related to the Clean Water Grant concept approval.

3. Concept approval was given on October 1, 1975.

4. The Environmental Protection Agency is administratively modifying the NPDES Permit to substitute definite dates in the time schedule for compliance with the sludge discharge prohibition.

The Board has notified the discharger and interested agencies and persons of its intent to modify waste discharge requirements for this discharge and has provided them with an opportunity to submit their written views and recommendations.

The Board in a public hearing heard and considered all comments pertaining to the discharge and to the tentative requirements.

IT IS HEREBY ORDERED, that Order No. 75-100 adopted by this Board on August 18, 1975, is modified as follows:

A. Page 16 is deleted and replaced by the attached page.

B. All other pages of Order No. 75-100 shall remain unmodified.

I, Raymond M. Hertel, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on December 1, 1975.

/s/ Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

RMH: dds

Task	Completion Date	Report of Compliance
D-1		
	January 1, 1976	January 15, 1976
	July 1, 1976	July 15, 1976
	January 1, 1977	January 15, 1977
Demonstration of compliance with limitations	July 1, 1977	July 15, 1977
B-1		
Completion of approvable plans and specifications for Phases I, II, and III	April 1, 1976	April 16, 1976
Award contract and begin construction	July 1, 1976	July 16, 1976
Receive delivery of Phase I dewatering equipment	December 31, 1976	January 16, 1977
Complete constrution of Phase I and achieve operational level	April 1, 1977	April 16, 1977
Complete construction of Phase II and achieve operational level	October 1, 1977	October 16, 1977
Complete construction of Phase III and achieve operational level	April 1, 1978	April 16, 1978
C		
Progress Reports on Program for Ultimate Disposal of Sludge	October 31, 1975	November 15, 1975
	July 1, 1976	July 15, 1976
	January 1, 1977	January 15, 1977
	July 1, 1977	July 15, 1977
	January 1, 1978	January 15, 1978

I, Richard A. Harris, am Assistant Executive Officer of the California Regional Water Quality Control Board, Los Angeles Region, certify that this record is a true and complete copy of the original document.

/s/ Richard A. Harris
RICHARD A. HARRIS

Modified 12/1/75

State of California
Resources Agency

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,
LOS ANGELES REGION

Order No. 76-80

ORDER DIRECTING THE CITY OF LOS ANGELES TO COMPLY WITH REQUIREMENTS PRESCRIBED BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION IN ORDER NO. 75-100 (NPDES PERMIT NO. CA-0109991) (C1 1492) (CA0109991) (M-1492)

The California Regional Water Quality Control Board, Los Angeles Region, finds:

1. City of Los Angeles discharges an average of 350 mgd (million gallons per day) of treated municipal wastewater and approximately 160 tons per day of sewage sludge to Santa Monica Bay from its Hyperion Treatment Plant in Playa del Rey under requirements prescribed jointly on August 18, 1975, by this Board and the United States Environmental Protection Agency in Order No. 75-100 (NPDES Permit No. CA0109991).

2. On December 1, 1975, this Board adopted Order No. 75-165, amending Order No. 75-100 and the NPDES Permit by modifying the time schedule for prohibition of sludge discharge to the ocean to provide for definite dates for compliance with the Tasks required for compliance with the Discharge Prohibition, as specified in Provisions B-1, and B-3 of Order No. 75-100.

3. The discharge requirements contained in Order No. 75-100 provide, in part, for the following Discharge Prohibition:

"B-1. As ordered by the schedule of compliance in Provision F-1 below, the discharge of sludge through Discharge Serial No. 003 shall be terminated."

"B-3. As used in this order, Phase I shall mean the facilities necessary to provide for the termination of no less than the first ⅓ of the sewage sludge presently discharged. Phase II shall mean the facilities necessary to provide for the termination of no less than an additional ⅓ of the sewage sludge presently discharged. Phase III shall mean the facilities necessary to provide for the termination of the final portion of sewage sludge.

4. The time schedule contained in Order No. 75-165 for accomplishment of the discharge termination for sludge is as follows:

Task	Completion Date	Report of Compliance
Completion of approvable plans and specifications for Phases, I, II, and III	April 1, 1976	April 16, 1976
Award contract and begin construction	July 1, 1976	July 16, 1976
Receive delivery of Phase I dewatering equipment	December 31, 1976	January 16, 1977
Complete construction of Phase I and achieve operational level	April 1, 1977	April 16, 1977
Complete construction of Phase II and achieve operational level	October 1, 1977	October 16, 1977
Complete construction of Phase III and achieve operational level	April 1, 1978	April 16, 1978

5. The City has not completed or reported compliance with the first Task set forth in Finding 4 listed above.

6. Failure to meet the completion date specified for approval plans and specifications makes it highly

probable that the City will fail to meet the subsequent completion dates for the remaining Tasks described above.

The Board in a public hearing heard and considered all testimony pertinent to the matter. All Orders referred to above and records of hearings and testimony therein are included herein by reference.

IT IS HEREBY ORDERED, that City of Los Angeles shall comply with the following:

1. In accordance with Water Code Section 13301, the City of Los Angeles is directed to comply with the provisions of discharge prohibited B-1 of Order No. 75-100 (NPDES Permit No. CA0109991) as amended by Order No. 75-165 in accordance with the following time schedule for elimination of sludge discharge to the ocean:

Phase	Not Later Than	The City Will
I	August 1, 1978	Reduce sludge discharge by 40 tons per day
II	April 1, 1979	Reduce sludge discharge by an additional 40 tons per day for a cumulative reduction of 80 tons per day
III	October 1, 1979	Reduce sludge discharge by an additional 40 tons per day for a cumulative reduction of 120 tons per day
IV	April 1, 1980	Eliminate all remaining discharges of sludge to the ocean. (Approximately 160 tons)

To accomplish compliance with the above schedule the City of Los Angeles shall perform the following tasks in accordance with the dates shown:

Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Advertise for the demolition work, trucks and dewatering equipment for Phases I, II, III & IV	August 1, 1976	August 15, 1976

Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Award contract for demolition, trucks and dewartering equipment for Phases I, II, III & IV	December 1, 1976	December 15, 1976
Submit final plans and specifications for support system	January 1, 1977	January 15, 1977
Award contract for support system	May 1, 1977	May 15, 1977
Complete construction of Phase I and achieve operational level	August 1, 1978	August 15, 1978
Complete construction of Phase II and achieve operational level	April 1, 1979	April 15, 1979
Complete construction of Phase III and achieve operational level	October 1, 1979	October 15, 1979
Complete construction of Phase IV and achieve operational level	April 1, 1980	April 15, 1980

City of Los Angeles shall submit to the Regional Board, the State Water Resources Control Board, and the Regional Administrator of Environmental Protection Agency on or before each compliance report date, a report on compliance or non-compliance with the specific schedule date and task.

If non-compliance is being reported, the reasons for such non-compliance shall be stated, plus an estimate of the date when City of Los Angeles will be in compliance. City of Los Angeles shall notify the Regional Board, the State Water Resources Control Board, and the Regional Administrator of Environmental Protection Agency by letter when it has returned to compliance with the time schedule.

2. If the City of Los Angeles fails to comply with any provision of this Order, the Executive Officer is authorized, and he is hereby directed, to request the

Attorney General and District Attorney to take the appropriate action against the discharger, including injunction and monetary remedies.

I, Raymond M. Hertel, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on May 24, 1976.

/s/ Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

I, Richard A. Harris, am Assistant Executive Officer of the California Regional Water Quality Control Board, Los Angeles Region, and certify that this record is a true and complete copy of the original document.

/s/ Richard A. Harris
RICHARD A. HARRIS

State of California
Resources Agency

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,
LOS ANGELES REGION

Order No. 76-202

AN ORDER AMENDING ORDER NO. 76-80 DIRECTING THE CITY OF LOS ANGELES TO COMPLY WITH REQUIREMENTS CONTAINED IN ORDER NO. 75-100 (CI 1492) (CA0109991) (M-1492)

The California Regional Water Quality Control Board, Los Angeles Region, finds:

1. City of Los Angeles discharges an average of 340 mgd (million gallons per day) of treated municipal wastewater and approximately 160 tons per day of sewage sludge to Santa Monica Bay from its Hyperion Treatment Plant in Playa del Ray under requirements prescribed jointly on August 18, 1975, by this Board and the United States Environmental Protection Agency in Order No. 75-100 (NPDES Permit No. CA0109991).

2. On December 1, 1975, this Board adopted Order No. 75-165, amending Order No. 75-100 and the NPDES Permit by modifying the time schedule for prohibition of sludge discharge to the ocean to provide for definite dates for compliance with the tasks required to comply with the Discharge Prohibition, as specified in Provisions B-1, and B-3 of Order No. 75-100.

3. The City failed to meet the completion dates as specified in Order No. 75-165 and at a hearing held May 24, 1976, this Board adopted Order No. 76-80 directing the City of Los Angeles to comply with requirements, as prescribed by this Board, to eliminate sludge discharge to the ocean.

Order No. 76-80 included the following time schedule to insure the elimination of the sludge discharge to the ocean by April 1, 1980:

Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Advertise for the demolition work, trucks, and dewatering equipment for Phases I, II, III & IV	August 1, 1976	August 15, 1976
Award contract for demolition, trucks and dewatering equipment for Phases I, II, III & IV	December 1, 1976	December 15, 1976
Submit final plans and specifications for support system	January 1, 1977	January 15, 1977
Award contract for support system	May 1, 1977	May 15, 1977
Complete construction of Phase I and achieve operational level	August 1, 1978	August 15, 1978
Complete construction of Phase II and achieve operational level	April 1, 1979	April 15, 1979
Complete construction of Phase III and achieve operational level	October 1, 1979	October 15, 1979
Complete construction of Phase IV and achieve operational level	April 1, 1980	April 15, 1980

4. City of Los Angeles notified this Board by letter dated September 29, 1976, that they would be unable to complete submittal of final plans and specifications for the support system by the due date, January 1, 1977. The City stated that the support system is being designed in two phases and requested that the current time schedule be revised to allow the submittal of the final plans and specifications in two stages. The City has assured the Board that all final construction and operation due dates in Order No. 76-80 will be met on time without change.

IT IS HEREBY ORDERED, that Order No. 76-80 adopted by this Board on May 24, 1976, is amended as follows:

1. The time schedule for compliance contained in Item 1 is deleted, and replaced with the following:

Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Award contract for demolition, trucks and dewatering equipment for Phases I, II, III & IV	December 1, 1976	December 15, 1976
Submit plans and specifications necessary to meet Phase I	January 1, 1977	January 15, 1977
Award contract for Phase I support system	May 1, 1977	May 15, 1977
Submit final plans and specifications for Phases II, III & IV	November 1, 1977	November 15, 1977
Award contract for Phases II, III, & IV support system	April 1, 1978	April 15, 1978
Complete construction of Phase I and achieve operational level	August 1, 1978	August 15, 1978
Complete construction of Phase II and achieve operational level	April 1, 1979	April 15, 1979
Complete construction of Phase III and achieve operational level	October 1, 1979	October 15, 1979
Complete construction of Phase IV and achieve operational level	April 1, 1980	April 15, 1980

City of Los Angeles shall submit to the Regional Board, the State Water Resources Control Board, and the Regional Administrator of Environmental Protection Agency on or before each compliance report date, a report on compliance or non-compliance with the specific schedule date and task.

If non-compliance is being reported, the reasons for such non-compliance shall be stated, plus an estimate of the date when City of Los Angeles will be in compliance. City of Los Angeles shall notify the Regional Board, the State Water Resources Control Board, and the Regional Administrator of Environmental Protection Agency by letter when it has returned to compliance with the time schedule."

2. All other parts of Order No. 76-80 shall remain in full force and effect.

I, Raymond M. Hertel, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on November 22, 1976.

/s/ Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

RMH: dds

I, Richard A. Harris, am Assistant Executive Officer of the California Regional Water Quality Control Board, Los Angeles Region, and certify that this record is a true and complete copy of the original document.

RICHARD A. HARRIS
/s/ Richard A. Harris

OFFICE OF
CITY ATTORNEY
CITY HALL EAST
Los Angeles, California 90012

[SEAL]

BURT PINES
CITY ATTORNEY

December 9, 1976

Mr. Paul DeFalco
Regional Director
United States Environmental
Protection Agency
Region IX
100 California Street
San Francisco, California 94111

Re: OBJECTIONS TO THE ENVIRONMENTAL PROTECTION AGENCY'S NEGATIVE DECLARATION ON THE PROPOSED ACTION BY THE ENVIRONMENTAL PROTECTION AGENCY OF MAKING A GRANT OFFER TO THE CITY OF LOS ANGELES FOR THE PROJECT TITLED HYPERION TREATMENT PLANT, INTERIM SLUDGE PROCESSING AND DISPOSAL SYSTEM

Dear Mr. DeFalco:

The purpose of this communication is to lodge with you a formal protest, on behalf of the City of Los Angeles, as to your decision to proceed with the funding of the Hyperion Treatment Plant Interim Sludge Project without the preparation and serious consideration of a full environmental impact statement (EIS) pursuant to the provisions of the National Environmental Policy Act. The City of Los Angeles strongly believes that there are serious environmental considerations involved with the proposed project that under federal law are required to be seriously analyzed and considered in an appropriate EIS before the proposed project may properly proceed. In that regard, the view of the governing body of the

City of Los Angeles, its City Council, is set forth in a motion unanimously adopted by the City Council on Tuesday, December 7th, a copy of which we have enclosed.

The City of Los Angeles has received EPA's negative declaration and environmental impact appraisal for the above project. The City strongly questions the validity of the utilization of a negative declaration in support of the agency action.

EPA's environmental impact appraisal stated that the project consists of dewatering the disgested sludge by centrifugation at the Hyperion Treatment Plant (HTP) and hauling the sludge cake by truck to the Palos Verdes Class 1 saniltary landfill. The project capacity will be 160 dry tons/day and will be constructed in four phases, with construction of 40 dry tons/day capacity in each phase. The project will provide for the complete removal of sludge from the ocean by April 1, 1980. EPA's environmental impact appraisal goes on to state that when the entire project is operational, the trucking operation will require 255 round trips/week with a hauling distance of 42 miles/round trip. Operation of the centrifuges will require about 640 lbs. per day of chemical polymers and will consume about 13.1 million kwh/year of electricity. An estimate of energy consumption for the transport of the sludge cake to the Palos Verdes landfill is 3,600 barrels of oil per year. EPA's environmental impact appraisal further states that there will be dust and noise due to the construction work at HPT, impacts on the sanitary landfill site itself and impacts from the transport of the sludge to the site.

The environmental impact appraisal of EPA states, on page 9:

> "Following are the unavoidable adverse impacts from the project:
>
> (a) The energy and materials required for the construction of the dewatering facilities and the energy required for hauling of the sludge cake to the landfill *are less than any alternative which accomplishes the objective of removing City of Los Angeles sludge from the Pacific Ocean.* Sludge disposal of the landfill will have *less impact on the total environment* than any of the other alternatives when energy, time, and biotic effects are considered; (b) Dust generation during the construction of the facilities, and noise impacts from the dewatering and trucking operations are minimal; (c) the air quality impacts of the trucking are less than the impacts for any alternative except the "no project" which does not comply with State and Federal laws." (Emphasis added)

EPA, in its environmental impact appraisal, attempts to justify the utilization of a negative declaration on the ground that the project would have less environmental impact than any other alternative which EPA considered. In the City's view, this does not justify a negative declaration.

The administrative action of the EPA, which the negative declaration purportedly supports, is the award of a grant pursuant to the Federal Water Pollution Control Act. Such action of the EPA is subject to environmental review pursuant to the National Environmental Policy Act, 40 Code of Federal Regulatons, 35.925-8. EPA was required to make an environmental review, pursuant to 40 CFR 6.204, to determine whether *significant impacts* are anticipated from the proposed action, whether any feasible alternatives can be adopted or changes can be made in project design to eliminate significant adverse impacts, and whether an EIS or a negative declaration is required. Section 6.212(a) of these regulations states that when the environmental review indicates there will be *no significant impact or significant adverse impacts have been eliminated by making changes in the project,* the responsible official shall prepare a negative declaration to allow public review of his decision before it becomes final. However, clearly the law does not provide that a negative declaration can be prepared merely because it is believed the project will have less of an environmental impact than the other alternatives.

The principal concern of the City of Los Angeles is the total failure of EPA to consider the consequences of continuing the discharge of sludge into the ocean, the

alternative described as "No project". EPA has summarily dismissed this alternative in its environmental impact appraisal as not complying with State and Federal laws. We are unaware of any State or Federal law that mandates the Interim Sludge Processing and Disposal System that is the subject of the instant grant offer, nor are we aware of any requirements of law that require the City to diccontinue discharge of sludge to the ocean at this time. Even if we accept the proposition that EPA need not consider an alternative that conflicts with the mandate of a federal statute, it is our judgment that at most the discontinuance of ocean dumping of sludge may not be required by the Federal Water Pollution Control Act until 1985. Any decision to require such discontinuance prior to that date is purely within the discretion of EPA. Clearly, pursuant to 40 CFR 6.304(b), EPA is required to prepare an EIS, which ". . . shall develop, describe, and objectively, weigh feasible alternatives to any proposed action, *including the options of taking no action or postponing action.*" (Emphasis added.)

The City, in its environmental assessments did not consider the continuation of sludge discharge into the ocean as an alternative since the City was subject to an order of a State Regional Water Quality Control Board ordering the eventual cessation of ocean discharge of sludge. Pursuant to The California Environmental Quality Act (Public Resources Code, Section 21154), the City was precluded from considering ocean discharge as an alternative since it would conflict with the State Agency's order. EPA, however, is not subject to the restraints of Section 21154.

Additionally EPA could not justify refusal to consider continuance of ocean discharge of sludge as an alternative merely because the law may preclude such discharge in the future or even at present. The United States Court of Appeals, District of Columbia circuit, in the case of *Natural Resource Defense Council, Inc.* v. *Morton*, 458 F.2d 827 (1972) stated that:

> "The need for continuing review of environmental impact of alternatives under NEPA cannot be put to one side on the ground of past determinations by Congress or the President." (p. 836.)

The court went on to say that:

> "The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decision makers in the legislative as well as the executive branch." (p. 837.)

The *Morton* case has been cited, as to this point, with approval in subsequent decisions. *Environmental Defense F., Inc.* v. *Corps of Engineers of United States Army*, 492 F.2d 1123, 1135 (1974); *Sierra Club* v. *Linn*, 502 F.2d 43, 62 (1974).

The failure of EPA to consider the alternative of continued ocean discharge is sufficient by itself to require further environmental assessment. The City of Los Angeles has other concerns, however, with the adequacy of the supporting data for EPA's Negative Declaration. For example, EPA's environmental impact appraisal is totally conclusionary in content. It states, on page 6, that the dust and noise due to construction activities will have minimal impacts on the surrounding area. There is no supportive data in the appraisal for this conclusion. It further states that the use of the Palos Verdes landfill for final disposal of sludge will result in the least environmental impacts from the hauling of sludge, (p. 7) and the impact on air quality is insignificant when compared to all other viable alternatives. (p. 8). Again there is no supporting data in the appraisal for these statements.

The appraisal declares that the "(n)oise impacts produced by this transport *should* be minimal because the trucks will be operated during normal working hours over standard truck routes." (p. 7, emphasis added.) This statement, by its very language, implies that the

noise impacts may not be minimal and thus there may be a significant environmental impact just from noise.

There are to be 255 round trips/week or 51 round trips on an average each day, which means 102 goings and comings from the landfill per day. Assuming the trucks operate on an eight hour day, and allowing for an hour going and coming, this could mean there would be six hours of activity in the area of the landfill, or approximately 17 trips per hour or approximately one every 3½ minutes. To what extent is there presently truck activity on these routes? How significant is the increase in truck activity, and in the use of the landfill? What impact will this trucking and project use of the landfill have on this area? The environmental impact appraisal does not even address these questions.

In making the determination as to whether a project will not have significant adverse environmental consequences, the inherent danger, as stated by the United States Court of Appeals (9th Cir.) in *City of Davis* v. *Coleman*, 521 F.2d 661, 673, is that the most serious environmental effects of a project may not be obvious, and that the purpose of the EIS requirements is to ensure that to the "fullest extent possible, agency decision-makers have before them and take into proper account a complete analysis of the project's environmental impact."

EPA's negative declaration asserts that it reviewed the City's environmental impact assessment. The City, in its assessment, namely, the final environmental impact report it prepared for the project, dated August 1, 1975, stated, on page 44, that the disposal of sludge at a landfill may produce severe unavoidable adverse environmental impacts. The City's EIR also states that the generation of noise and traffic, and the consumption of energy by the operation of the sludge dewatering facilities, trucks and landfill vehicles are adverse effects which cannot be avoided if the project is to be implemented. In short, both the City's EIR and EPA's Environmental Impact Appraisal indicate that the project may cause a significant affect on the environment.

The court, in *City of Davis* v. *Coleman, supra,* at p. 673 stated that an "EIS (Environmental Impact Statement) must be prepared whenever a project 'may cause a significant degradation of some human environmental factor.'" The court went on to quote with approval the language of the case of *Minnesota Public Interest Research Group* v. *Butts*, 498 F.2d 1320, wherein that court said:

> "An initial decision not to prepare an EIS precludes the full consideration directed by Congress. In view of the concern for environmental disclosure present in NEPA, the agency's discretion as to whether an impact statement is required is properly exercised only within narrow bounds. Action which *could* have a significant effect on the environment should be covered by an impact statement." (Emphasis added.)

The United States District Court in the case of *Pacific Legal Foundation* v. *Burns* (Central District, California), enjoined the operation of the Diamond Lane on the Santa Monica Freeway, stating therein that "in determining whether a project 'may have a significant effect on the environment,' the courts properly interpret that phrase to impose a low threshold requirement."

In the case of *Concerned Residents of Buck Hill Falls* v. *Grant*, 388 F. Supp. 394, 409, the United States Court of Appeals stated that:

> "The duty imposed on all federal agencies by N.E.P.A. to prepare an environmental impact statement in appropriate cases is to be construed generously and enforced strictly; Congress intended by enacting NEPA to require all federal agencies to give fuller study and consideration to environmental effects to their projects, a goal which can be realized only by requiring strict compliance with the procedure set forth in Section 102(2)(C) of the Act."

The United States Court of Appeals in *Calvert Cliffs Coordinating Committee* v. *United States Atomic Energy Commission*, 449 F.2d 1109, 1112 (1971) (D.C. Cir.)

stated that NEPA contains very important "procedural" provisions—"provisions which are designed to see that all federal agencies do in fact exercise the substantial discretion given them. These provisions are not highly flexible. Indeed, they establish a strict standard of compliance."

The Palos Verdes landfill adjoins a residential area. We are advised that representatives of the affected communities have already contacted you to underscore their serious concerns regarding the potential impacts on their communities. By utilizing the EIS procedure, EPA would be required to publish a notice in local newspapers stating that the draft EIS is available for comment and listing where copies could be obtained, and submitting news releases to other media. 40 CFR 6.208(b)(3). A public hearing would also be available. While EPA is not required by statute to hold public hearings on EIS's the responsible official should hold a public hearing on a draft EIS whenever a hearing may facilitate the resolution of conflicts or significant public controversy. 4 CFR 6.402. Certainly, however, only by complying with the EIS procedures can all the affected parties present their concerns and have them properly evaluated and considered.

The City of Los Angeles has not decided that the Palos Verdes landfill is the appropriate landfill for disposal of HTP sludge. Even if it is eventually determined to be the most appropriate site, what happens when it is filled? We see no evidence in EPA's data that indicates EPA is aware of the remaining capacity of the site and the projected demand for other refuse disposal at the site. If the Class I landfill capacity of Southern California is used up for sludge disposal, what alternative disposal methods are available for those wastes, many hazardous, that can only be placed in Class I landfills? In light of these factors, we must question the validity of EPA's statement in the Environmental Impact Assessment that "No secondary impacts on the environment are anticipated from the implementation of the project."

This City continues to be very concerned about the tentative decision to use the Palos Verdes landfill for

disposal of the sludge. It will be difficult to cope with the almost certain public controversy that will ensue when the communities surrounding the Palos Verdes landfill, or communities around other potential landfill sites, become aware of the intention to dispose of the sludge at those sites if a thorough environmental assessment of alternatives has not been done. As noted above, the preparation and public review of an EIS will allow public participation and comment on all of the alternatives involved before a decision has been finally made.

Finally, the Environmental Impact Assessment identifies a number of alternative methods of disposing of the sludge when ocean discharge is discontinued and dismisses them summarily on the basis of higher costs, other environmental considerations, conflict with existing EPA requirements due to delays in implementing the alternative, or uncertainty as to technological capability. We are not aware of any in-depth study of these alternatives to determine whether the conclusions supporting their rejection are valid, and if so, whether on balance the disadvantages of disposal in the Palos Verdes landfill might not outweigh the disadvantages of other alternatives, even if they are more costly or pose other problems.

It is requested, therefore, that EPA prepare a full and legally adequate environmental impact statement developing, describing, and objectively weighing feasible alternatives to the project, as required by the National Environmental Policy Act and applicable regulations thereunder, including the options of taking no action or postponing action. The feasible alternatives should include the alternative of the continuation of sludge discharge into the ocean.

EPA's environmental impact appraisal, both by its inclusions and ommissions, indicates that an EIS is necessary prior to EPA's making a grant offer in this matter. It is our judgment that without an EIS the grant offer would be in violation of NEPA, a situation that the City of Los Angeles cannot countenance. We feel confident that EPA, as the principal federal agency responsible for protecting the nation's environment, also

desires to avoid a clear violation of the applicable federal law.

We trust you will advise us of the actions you intend to take in response to this formal protest as expeditiously as possible.

Very truly yours,

BURT PINES
City Attorney

By/s/ L. L. Hoffman
LAWRENCE L. HOFFMAN
Chief Assistant City Attorney
On behalf of the City of
Los Angeles

LLH:jm

cc: Hon. Tom Bradley, Mayor
Each Member of the City Council
Hon. Board of Public Works
Dr. C. Erwin Piper, City Administrative Officer
Donald C. Tillman, City Engineer
State Water Resources Control Board
State Regional Water Quality Control Board
Ken Spiker, Chief Legislative Analyst

[EMBLEM]

LOS ANGELES AREA
CHAMBER OF COMMERCE
404 South Bixel Street, P.O. Box 3696
Los Angeles, California 90051

(213) 482-4010

December 15, 1976

Mr. Paul De Falco, Jr.
Regional Administrator
U. S. Environmental Protection Agency
Region IX
100 California Street
San Francisco, California 94111

Hyperion Treatment Plant,
Interim Sludge Processing
and Disposal System

Dear Mr. De Falco:

This is in reply to your letter of November 18, 1976, to All Interested Government Agencies and Public Groups in connection with the proposed modifications to the Hyperion Treatment Plant and Interim Sludge Processing and Disposal System.

Chamber of Commerce Position

Briefly, it is the position of the Los Angeles Area Chamber of Commerce that an environmental impact report must be prepared, circulated, considered and approved by the City of Los Angeles, the State Water Resources Control Board and the U. S. Environmental Protection Agency in connection with the proposed plans to stop the discharge of sludge from the City of Los Angeles Hyperion Treatment Plant and to provide for the disposal of this sludge by transportation and disposal in an appropriate sanitary landfill, or by incineration, or some other means of disposal.

It is the position of the Los Angeles Area Chamber of Commerce, based upon a detailed analysis of the pro-

posal that there will be a significant and major impact on the environment if the proposed Interim Sludge Processing and Disposal System contemplated by the Agency is carried out. In addition, there will be a substantial financial impact on the citizens and taxpayers of Los Angeles. Since there is no demonstrable adverse environmental impact from the present system of sludge disposal into the deep submarine ocean waters off of southern California, there are no demonstrable benefits to be derived from putting the proposed plan into effect.

Finally, the Los Angeles Area Chamber of Commerce believes that the Agency's letter of November 18, 1976 has not been sent to a sufficient number of public agencies and other interested parties in southern California to constitute adequate notice of the Agency's proposed plans. The Agency's proposal with its significant environmental and financial impact has not been published in the Federal Register as required under the Federal Register Act. Finally, no provision has been made for necessary public hearings at which the environmental effect of the Agency's proposed Interim Sludge Processing and Disposal System can be evaluated.

In essence, since the proposed plan involves action by the City of Los Angeles, the California State Water Resources Control Board, and the U. S. Environmental Protection Agency, the statutory and procedural requirements imposed by the California Environmental Quality Act and the National Environmental Protection Act must be complied with.

Background of Proposed Project

At the present time the City of Los Angeles' major Hyperion Treatment Plant discharges 360 million gallons per day of waste water effluent and the resulting digested primary and secondary sludge into a deep submarine canyon in the Pacific Ocean through an outfall terminating 7 miles offshore at a depth of 330 feet. The effluent is 0.75% (3/4 of 1%) suspended solids, made up of:

1.3 mgd of screened digested sludge (primary)
1.0 mgd of waste activated sludge (secondary)
2.5 mgd of secondary effluent
—
4.8 mgd average daily discharge

This method of disposal of the sludge has been in effect and in operation for a period of nearly 20 years. Under the Agency's proposed plan to alter this method of sludge disposal, instead, special dewatering facilities are to be installed at the Hyperion Treatment Plant. The resulting estimated 800 wet tons per day of sludge are then to be trucked across the City and disposed of by dumping into an acceptable sanitary landfill. While such sludge dumping, constituting a Class 1 landfill operation is now permitted at the nearby Palos Verdes landfill site, starting in about 1980, it will be necessary to truck the resulting sludge a distance of up to 40 miles for dumping in the City's Lopez Canyon sanitary landfill site in the Sunland-Tujunga area or up to 40 miles for disposal in the Los Angeles County Calabasas sanitary landfill.

> The present volume of sludge in the underwater offshore submarine canyon has occupied an area of about 2 kilometers with a depth of up to 1 meter. An even greater allowance for disposition of such volumes of sludge will be required in Lopez Canyon or any alternate site utilized under the Agency's plan.

Based upon an 80-mile round trip for each truck load and 50 truck loads per day it is estimated that 350,000 additional gallons of gasoline will be consumed on an annual basis adding to the air pollution and congestion in the Los Angeles Air Basin. In this regard, both the California Air Resources Board, and the U. S. Environmental Protection Agency itself, have already expressed their concern over the emission of any additional air pollutants into the Los Angeles Air Basin, stating that such additional emissions can only be authorized in the event that there be a shut-down of an equivalent amount of other air emissions on a "trade-off" basis. No such

"trade-off" is contemplated under the Agency's proposed plan.

Lack of Environmental Benefit

In order to assess the environmental impact of the present Los Angeles City and County sanitation waste discharge practices, since 1969, both the City and County have participated in a joint Southern California Coastal Water Research Project employing about 30 qualified scientists, at a cost of about $800,000 a year. $500,000 of this cost is underwritten by the Cities of Los Angeles and San Diego, Ventura County, and the County Sanitation Districts of Los Angeles and Orange Counties. An additional $230,000 is underwritten by the U. S. Environmental Protection Agency, and the remainder of the funding is from miscallaneous sources, including the University of California. Over the more than five years of the Project's existence more than $5 million has been expended studying the biology, chemistry and engineering problems covering the Southern California Bight ocean area from Ventura County to the Mexican Border, the ocean area into which the City's Hyperion Plan effluent and sludge is discharged.

The Project's research work, carried on over a period of time, has analyzed in detail the effect on marine life, including fish, marine life, invertebrates, and bacteria in the entire scuthern California offshore area. The Project's conclusion, as set forth in the Project's 755-page 1973 Three Year Report is:

> "Because of the generally minor and reversible nature of the effects and uncertainty as to the actual consequences of the most well-intentioned corrective actions, there is presently no justification for any major alteration of waste management or discharge practice . . ."

The present Director of the Project has concluded that there appears to be "no possibility" of harming a "significant percentage of the population of any species" of marine animals. Even if the present waste discharge

practices are continued for several years at about the present rate and toxicity it is his opinion, backed by the scientists working on the project, that there will not be "any serious or irreversible effect on the sealife."

Compared to the continuation of the present practice of discharging sewage effluent and sludge into the deep ocean waters of California the Agency's proposed Interim Sludge Processing and Disposal System would have significant adverse environmental impacts not only with respect to the transportation of the sludge, but with respect to the environmental impact of the disposition of the resulting sludge in the Lopez Canyon and Calabasas sanitary landfills. In this connection the environmental impact on adjacent landfill homeowners, the effect on the flora and fauna and the ecology of the sanitary landfill area concerned must be assessed, as well as the effect on ground water supplies underlying the areas in which the disposition is planned to take place. In this regard, the need for environmental impact analysis for exactly such proposed landfill operations has been precisely recognized in the preparation and presentation of a four-volume Environmental Impact Statement covering the City of Los Angeles' proposed reactivation of the Mission Canyon Landfill area for exactly the type of sanitary landfill operations proposed in the present plan.

Adverse Financial Impact

In addition to the substantial adverse environmental impact (which does not exist under the present deep ocean submarine sludge disposal system) there is a clear adverse financial impact. According to the Agency's letter not only will new project facilities totalling $7.2 million be required, but in addition to this, substantial increased Operation and Maintenance Expenses will also be incurred.

In contrast to the Agency's statement, it is the City of Los Angeles' estimate that the cost to implement the interim sludge processing project is estimated at $10.9 million of which the City anticipates grant reimburse-

ment of approximately $8.5 million. However, the estimated Operation and Maintenance cost is $3.7 million annually and is not grant eligible. Since it may take five years to implement a permanent process which may be recommended in a present on-going regional study, if the interim process is operational through this five year period, the total cost of the interim project will be $31.3 million. Inasmuch as the wastewater study will be completed in a reasonably short time and may show that no project is necessary, there is serious doubt whether the Agency's interim proposal is cost effective.

Under the criteria established in the 1972 Water Pollution Control Act, these additional costs must be met by increases in sewage process or user charges imposed on water consumed by the City's Residential, Commercial, and Industrial water users or by increases in property taxes imposed upon Los Angeles taxpayers.

Under the alternatives required to be reviewed and under the environmental review required, the lack of present environmental impact and increased adverse impact of the proposed Agency plan and its financial impact must be considered.

Lack of Notice and Hearings

In its letter of November 18, 1976, the Agency's administrator sets forth the Agency's plan in a 2-page letter concluding with the Agency's "preliminary decision" not to prepare an environmental impact statement, going on to state that no action would be taken within 15 working days from the November 18th date of the Notice—presumably providing a basis for Agency action after December 10th.

In this regard it is the Chamber of Commerce's position that there has been a lack of effective notice of the Agency's plans. Not only was the Agency's November 18th letter circulated only to a small restricted service list, but no notice of the Agency's action was published in the Federal Register as required under the Federal Register Act. Since the Agency's present action would

circumvent the environmental review principles set forth in the National Environmental Policy Act by refusing to prepare and circulate an appropriate Environmental Impact Report, additional formal notices must be given of the Agency's plans in this regard.

The need for this additional notice and the required holding of hearings are evident by the Agency's actions in similar circumstances regarding the City of Philadelphia's proposal to continue its 2-year practice of sludge disposal into shallow Delaware Bay waters adjacent to the City of Philadelphia. In that case involving the Interim Ocean Disposal permission granted to the City of Philadelphia (Permit No. PA-010) several days of hearings were held. At the end of this hearing period, at which representatives of the City of Philadelphia appeared and testified a detailed 65-page Report was prepared by the Chairman of the panel convened and designated by the Environmental Protection Agency (G. William Frick, Panel Chairman) September 19, 1975. Thereafter, on September 25, 1975, the Agency administrator issued an 8-page decision reviewing the circumstances (Russell E. Train, Administrator).

While it is the Chamber of Commerce's position and understanding that the circumstances surrounding the disposition of sludge in the shallow waters of the Delaware Bay are different than the circumstances surrounding the disposal of sludge over a 20-year period from the City of Los Angeles' Hyperion Treatment Plant into the deep submarine ocean waters off of southern California, it is nevertheless clear that based on this direct precedent, the sufficient environmental issues were raised in that case, and are raised in this case to require the preparation of an environmental impact report—plus a detailed further Agency environmental review followed by hearing process for disposition of the issue raised by the Agency's proposed plan.

Under these circumstances, it is the Chamber of Commerce's position that in view of the lack of environmental benefit from the proposed plan, and the adverse environ-

mental impact that is predicted to result and the financial impact on the City of Los Angeles water users, a similar environmental review process must be followed by the Agency in the present instance.

Summary

In sum, it is the position of the Los Angeles Area Chamber of Commerce that an environmental impact report must be prepared, circulated, considered and approved by the City of Los Angeles, the State Water Resources Control Board and the U.S. Environmental Protection Agency in connection with the proposed plans to stop the discharge of sludge from the City of Los Angeles Hyperion Treatment Plant and to provide for the disposal of this sludge by transportation and disposal in an appropriate sanitary landfill, or by incineration, or some other means of disposal.

It is the position of the Los Angeles Area Chamber of Commerce, based upon a detailed analysis of the proposal that there will be a significant and major impact on the environment if the proposed Interim Sludge Processing and Disposal System contemplated by the Agency is carried out. In addition, there will be a substantial financial impact on the citizens and taxpayers of Los Angeles. Since there is no demonstrable adverse environmental impact from the present system of sludge disposal into the deep submarine ocean waters off of southern California, there are no demonstrable benefits to be derived from putting the proposed plan into effect.

A copy of the Resolution of the City Council concerning this issue approved on October 22, 1975 is attached for your information.

Copies of this letter are being sent to the California State Water Resources Control Board, and a number of City of Los Angeles officials including the Mayor, the City Council, its Public Works Committee, the City's Department of Public Works and its Bureau of Sanitation. In addition, copies are being forwarded to interested sanitation officials and other interested parties in

southern California, as well as to other southern California members of the Legislature and Congress.

Yours very truly,

/s/ Albert C. Martin
ALBERT C. MARTIN
President

RESOLUTION

WHEREAS the Federal Water Pollution Control Act amendments of 1972 (PL 92-500), require the discontinuance of the discharge of pollutants, including sludge, into the waters of the United States; and

WHEREAS the Water Quality Control Plan for Ocean Waters of California, prepared pursuant to the Porter-Cologne Water Quality Control Act, requires the discontinuance of ocean disposal of sewage sludge; and

WHEREAS at the request of the Federal Environmental Protection Agency (EPA) and the State Water Resources Control Board (SWRCB) the City has entered into a joint regional Wastewater Solids Management Program study with the sanitation districts of Los Angeles and Orange Counties and the EPA and SWRCB to develop a long term regional solution for sludge disposal, which study is estimated to be complete in the fall of 1978; and

WHEREAS the City is participating in the Southern California Coastal Water Research Project which is studying the effects of wastewater discharges, including sludge, into Santa Monica Bay; and

WHEREAS the City is currently disposing of sludge into the ocean under the authority of a National Pollution Discharge Effluent System (NPDES) permit issued jointly by the EPA and the California Regional Water Quality Control Board, which permit requires the City to partially discontinue ocean disposal of sludge by April 1977; and

WHEREAS it is within the legal authority of the EPA and the California Regional Water Quality Control Board to review the NPDES permit and extend the sludge out deadline until such time as the regional Waste Water Solids Management Program study is complete; and

WHEREAS the Executive Officer of the State Water Resources Control Board in a letter to the City Engineer

on October 31, 1974, stated that should the engineering and environmental feasibility of implementing an interim sludge out project "show that these solutions are not cost effective or environmentally acceptable, we will then give further consideration to your request to an extension of the deadline."; and

WHEREAS there is no consensus of scientific opinion that the City's current practice of ocean disposal of sewage sludge has more significant adverse environmental effects than land disposal; and

WHEREAS the environmental impact report for the interim sludge out alternatives which shows that the interim sludge out proposal is not cost effective inasmuch as the proposed hauling of sewage sludge by trucks to a landfill site, at an implementation cost of $10,940,000 and an annual operation expense of $3,700,000, may become obsolete upon completion of the regional Wastewater Solids Management Program study in the fall of 1978; and

WHEREAS the said environmental impact report shows that land disposal of sludge has adverse environmental effects; and

WHEREAS the City does not presently have adequate funds available for the interim sludge project and also the mandatory upgrading of the City's wastewater treatment facilities; now

THEREFORE BE IT RESOLVED that the City of Los Angeles hereby requests the Regional Administrator of the Federal Environmental Protection Agency and the State Regional Water Quality Control Board to review the current NPDES permit and postpone the deadline for the discontinuance of ocean disposal of sewage sludge until a reasonable time after the regional Wastewater Solids Management Program study is completed.

PACIFIC LEGAL FOUNDATION
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone (916) 444-0154

December 30, 1976

Mr. Paul De Falco, Jr.
Regional Administrator
United States Environmental
Protection Agency
Region IX
100 California Street
San Francisco, CA 94111

Dear Mr. De Falco:

Pacific Legal Foundation, as a nonprofit public-interest law firm, has examined the legal basis for the requirements emanating from the EPA and the State Water Quality Control Board concerning discharges from the City of Los Angeles Hyperion Treatment Plant. This letter contains our conclusions on the law and our request for EPA to take certain corrective actions which we believe to be in the public interest.

It is our understanding that EPA bases the requirements it is making concerning the elimination of the discharge of digested sewage sludge to ocean waters and the achievement of secondary treatment standards for effluent from the Hyperion Plant on the belief that these requirements are mandated by Congress in the Federal Water Pollution Control Act Amendments of 1972. PL 92-500. For that reason, EPA has not and will not consider developing reasonable standards for the discharges from the Hyperion Plant based on the environmental impact to the ocean area concerned.

We disagree with this reading of the law. In fact, the law applicable to ocean discharges specifically requires thorough consideration of the environmental impacts of such discharges and the setting of reasonable standards based upon the analysis of such environmental impacts. EPA's own regulations governing the requirements for

ocean discharges specifically state this same interpretation. For these reasons, it is requested that EPA immediately suspend any orders, requirements or permit conditions directed toward the City of Los Angeles concerning the cessation of ocean discharge of digested sewage sludge or the upgrading of wastewater treatment facilities which discharge to the ocean to secondary treatment standards. Specifically, requirements to this effect in NPDES Permit CA 0109991 and any approved federal grants are to be suspended and no such requirements included in future permits or grant approvals until a thorough environmental analysis has been completed and standards developed for the affected ocean area based on the environmental aanlysis as required by law.

We have been informed that EPA is basing its present requirements on Section 301(b)(1)(B) of PL 92-500. EPA is reading into that section a requirement that all publicly owned wastewater treatment plants must achieve secondary treatment technology regardless of where the plant is located and how it is operated. Section 301 must be read in the context of the entire act.

We must call to your attention that the definitions of "discharge of pollutants" as used in Section 101(a)(1) and "effluent limitations" as used in Section 301(b)(1)(B) carefully preserve the distinction between navigable waters and ocean waters. Sections 501(11) and (12). These distinctions clearly convey the intention of Congress that requirements concerning discharges to the different waters were not indiscriminately lumped together.

To the extent that PL 92-500 is directed towards discharges into the ocean waters, a specific provision is included as Section 403. The requirements of Section 403 differ substantially from Section 301 in that the standards to be applied are not to be based on technological achievement, but rather on environmental impacts. It is clear that, as stated in the EPA's own regulations, Section 403(c) requires "that applications for permits for the dumping or other discharge of any materials into the marine environment be evaluated on the basis of

the impact of the materials on the marine environment . . ., and on the economic and social factors involved." 40 C.F.R. 227.1(c). EPA's regulations also make it clear that these requirements apply to "discharge through outfalls." 40 C.F.R. 227.1(b).

It is also pertinent to note that shortly after the passage of PL 92-500, directed primarily at the protection of navigable waters, the same Congress felt it appropriate to pass PL 92-532, directed at protection of ocean waters. The requirements for criteria in this second law are very similar to Section 403 of PL 92-500—so similar, in fact, that EPA has chosen to adopt a single set of regulations to implement both. 40 C.F.R. 227. In this second law, Congress reaffirmed its intention that control of pollutants in the ocean be based on criteria concerning the impact on the marine environment. Section 102.

Since the definition of navigable waters (to which Section 301 applies) includes "territorial seas" (Section 502(7)) and since Section 403 by its terms applies directly to the "territorial seas," there is the potential for some initial confusion as to the application of these two sections. However, Section 403 is a specific requirement by Congress that NPDES Permits issued pursuant to Section 402 "for a discharge into the territorial sea" must be issued in compliance with the guidelines established under the requirements of Section 403 "for determining of the degradation of the waters of the territorial seas. . .". EPA openly admits in the regulations published pursuant to Section 403 that this section contains a congressional mandate that discharges must be "evaluated on the basis of the impact on the marine environment. . ." 40 C.F.R. 227.1(c). This specific mandate by Congress cannot be avoided by reference to Section 301 which is a general section on "Effluent limitations."

As an additional factor of significance, it should be noted that the Hyperion Treatment Plant discharges effluent and sludge not to the "territorial seas" but to the "contiguous zone," an area clearly included in PL 92-500

in Section 403 *only*. Only a single emergency outfall discharges into the territorial sea and such discharges are rare.

While Congress may have intended a uniform national requirement for discharges to the navigable waters based on treatment technology, it is clear that the congressional intent in the case of discharges to the oceans was that requirements would be based on the environmental impacts likely to result.

The requirements in Section 403(c) of PL 92-500 and Section 102(c) of PL 92-532 for a complete environmental analysis, including economic and social factors, of the marine environment are separate and distinct from the requirement for the development of an Environmental Impact Statement under the National Environmental Policy Act. While we hold grave reservations as to the legality and, in particular, the appropriateness of EPA's use of a "negative declaration" for the Hyperion Plant in lieu of an EIS, we are not asserting that matter here. It is clear that the requirements of PL 92-500 and PL 92-532 can not be set aside by a "negative declaration" and that a comprehensive environmental review must be performed to comply with these laws. It would be most appropriate from the standpoint of the public interest for EPA to prepare a single comprehensive analysis which would conform to the full requirements for study, analysis, public participation, open disclosure and open decision making of all three laws.

We have been informed that substantial scientific and technical information exist which show that requirements for the Hyperion Treatment Plant if developed pursuant to Section 403(c) of PL 92-500 and Section 102(c) of PL 92-532 would not require secondary treatment for all discharges. We have also been informed that a full review as required by the applicable laws, including the economic and social factors involved, would most likely indicate that shifting of the disposal of all sludge from ocean waters to landfill would be environmentally, economically and socially undesirable.

Under these circumstances, we believe EPA has a duty to suspend the present requirements in NPDES Permit No. CA 0109991 relating to the cessation of discharge of sludge to ocean waters and to the upgrading of the Hyperion Plant technology to secondary treatment levels. No similar requirements should be included in a future permit until a full environmental analysis, including economic and social factors of the ocean discharge of effluent and sludge, has been completed. As soon as possible, a new NPDES permit should be issued to the City of Los Angeles including only those conditions necessary to provide adequate protection to the marine environment directly affected by the discharge from the Hyperion Plant in proper balance with the economic and social costs involved.

Sincerely,

RONALD A. ZUMBRUN
President and Legal
Director

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

[SEAL]

REGION IX
100 California Street
San Francisco, California 94111

CERTIFIED MAIL No. 450175 Jan. 31, 1977

Ronald A. Zumbrun
President and Legal Director
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814

Dear Mr. Zumbrun:

After giving careful consideration to your letter dated December 30, 1976, I have concluded that I must deny your request for the immediate suspension of the requirements of the NPDES permit issued for the City of Los Angeles Hyperion Treatment Plant. My conclusion is based upon the following considerations.

Section 301(b)(1)(B) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1311(b)(1)(B)) provides expressly that all publicly owned treatment works in existence on July 1, 1977, shall achieve "effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act." In turn, section 304(d)(1) (33 U.S.C. § 1314(d)(1)) requires the Administrator to publish "information, in terms of amounts of constituents and chemicals, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment." Neither section 301 nor 304 offers any indication that publicly owned treatment works discharging to ocean waters should be exempted from secondary treatment requirements. Thus, under a plain reading of section 301(b)(1)(B), all publicly owned treatment works, including those discharging

to ocean waters must achieve effluent limitations based upon secondary treatment.

This conclusion was affirmed by the General Counsel of EPA in a decision of law concerning the NPDES permit issued to the Greater Anchorage Borough. (NPDES Decision of Law No. 12). Like the Hyperion Plant, the treatment works owned by the Greater Anchorage Borough discharges directly to the ocean. The General Counsel ruled that this fact does not exempt the facility from the secondary treatment requirement of section 301(b)(1)(B).

In your letter, you point out that the definition of the terms "discharge of pollutants" and "effluent limitations" in section 501 of FWPCA (33 U.S.C. § 1361) preserve the distinction between navigable waters and ocean waters. Although it is true that these definitions use the terms navigable waters and oceans rather than using a single term for both, the important point is that both navigable waters and ocean waters are covered by the definitions. The reference to "effluent limitations" in sections 301(b)(1)(B) and 304(d)(1) thus requires the Administrator to establish effluent limitations based upon secondary treatment for both discharges to navigable waters and discharges to ocean waters. Similarly, the use of the term "discharge of pollutants" in section 402 (a)(1) requires the issuance of NPDES permits for discharges to ocean waters as well as for discharges to navigable waters. Furthermore, section 402 provides that NPDES permits must include the condition that each discharge will meet *all* applicable requirements of section 301 and 403. Section 402 thus requires EPA to issue NPDES permits for ocean discharges from municipal treatment works which contain effluent limitations based on secondary treatment as defined by the Administrator.

The regulations published by the Administrator defining the requirements of secondary treatment do not authorize less stringent effluent limitations for treatment works discharging to ocean waters. (40 C.F.R. § 133). The limitations established in this regulation for biological oxygen demand and suspended solids, moreover,

preclude the discharge of sewage sludge as well as primary effluent. In view of these requirements, it would be irresponsible to suspend the conditions of the NPDES permit issued to the City of Los Angeles for the Hyperion Plant.

An opportunity for any interested party to contest the conditions of the NPDES permit for the Hyperion Plant was available at the time that the permit was issued in August 1975. Although any interested person could have requested an adjudicatory hearing under 40 C.F.R. section 125.36, neither the City of Los Angeles nor any one else contested the conditions of the permit. In view of the fact that section 125.36 provides a specific procedure for review of the conditions of a permit, it would be inappropriate to reopen consideration of the NPDES permit for the Hyperion Plant at this date.

Regarding your request that EPA suspend the grant conditions for the Hyperion Treatment Plant, I have concluded that such action would be irresponsible and must be denied. The grant conditions requiring the elimination of discharges of sewage sludge and primary effluent were proposed by EPA pursuant to 18 C.F.R. § 601.25 (b) (36 F.R. 13029) and were accepted by the City of Los Angeles. As such, these conditions represent mutually agreed upon contractual obligations between EPA and the City of Los Angeles. With respect to future grants, section 201(g)(2) of FWPCA prohibits EPA from making grants for the construction of wastewater treatment works after fiscal year 1974 unless the grant applicant has demonstrated that the project will provide for the application of the best practicable waste treatment technology. Like section 301(b)(1)(B), section 201(g)(2) does not provide an exemption for projects which will discharge to ocean waters. Section 201 (g)(2) of FWPCA thus prohibits EPA from making grants to applicants which will not utilize at least secondary treatment technology. In view of this requirement, it is clear that any future grants to the City of Los Angeles must also include conditions requiring the

removal of sewage sludge and the achievement of effluent limitations based on secondary treatment.

Sincerely,

/s/ Paul DeFalco, Jr.
PAUL DEFALCO, JR.
Regional Administrator

California Regional Water Quality Control Board
Los Angeles Region
(213) 620-4460
Order No.
Amended Waste Dicharge Requirements

Environmental Protection Agency
Region IX
(415) 556-3430
Permit No. CA0109991
Amended Authorization to Discharge under the National Pollutant Dicharge Elimination System—Federal Water Pollution Control Act (33 U.S.C. 125 et. seq.)

FOR
CITY OF LOS ANGELES
HYPERION TREATMENT PLANT

The California Regional Water Quality Control Board, Los Angeles Region and the Regional Administrator, Environmental Protection Agency, Region IX, finds that:

1. City of Los Angeles discharges wastes under requirements contained in Order No. 75-100 adopted by this Board and the Regional Administrator on August 18, 1975. On December 1, 1975, May 24, 1976, and November 22, 1976, this Regional Board adopted Orders Nos. 75-165, 76-80 and 76-202 respectively, amending the time schedules contained in Order No. 75-100. Order No. 75-100 expires on February 1, 1977.
2. City of Los Angeles has filed a report of waste discharge and applied for renewal of its waste discharge requirements and National Pollutant Discharge Elimination System Permit prior to the expiration of the current requirements and Permit.
3. Adequate review time will not be available for the tentative waste discharge requirements prior to the expiration date of the current Order.
4. The City of Los Angeles has prepared a final environmental impact report in accordance with the California Environmental Quality Act (Public Resources Code Section 21000 et. seq.).

5. The City of Los Angeles has changed or altered the project as follows:

   a) Discharge of chlorinated secondary effluent out the 1-mile outfall during installation of the eductor—construction schedule has been arranged such that there should be no interruption of beach usage

   b) Discharge of primary effluent during construction of secondary facilities—construction activities have been timed so that primary effluent will be discharged out the 5-mile outfall instead of the 1-mile outfall.

   c) Cessation of sludge discharge to ocean-landfills utilized will have a shortened useful life —however, no other alternative is currently available. The problem is being studied by the State Water Resources Control Board and the Los Angeles/Orange Metropolitan Area Study Group.

6. The changes or alterations of the project mitigate or avoid the significant or lasting adverse environmental impacts of the project.

The Board and Regional Administrator have notified the discharger and interested agencies and persons of their intent to amend the waste discharge requirements and permit for this discharge and have provided them with an opportunity to submit their written views and recommendations.

The Board and the Regional Administrator in a public hearing heard and considered all comments pertaining to the tentative amended requirements and permit.

This National Pollutant Discharge Elimination System permit amendment shall take effect 30 days from the date of signature. The amendment to the State requirements is effective upon signature.

IT IS HEREBY ORDERED, that Order No. 75-100 adopted by this Board on August 18, 1975, and NPDES

Permit No. CA0109991 issued by the Regional Administrator on August 18, 1975, shall be revised as follows:

1. The expiration date in Provision F-5 is changed from February 1, 1977, to June 30, 1977.

2. All other limitations, prohibitions, requirements, and provisions of Order No. 75-100 and NPDES Permit No. CA0109991 shall remain in full force and effect.

This certifies that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, and of a National Pollutant Discharge Elimination Systems permit amendment issued by the Environmental Protection Agency, Region IX.

/s/ Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

Date: January 24, 1977

/s/ William H. Pierce
WILLIAM H. PIERCE
Chief, Permits Branch,
Enforcement Division
for the Regional
Administrator

Date: January 24, 1977

STATE OF CALIFORNIA—RESOURCES AGENCY

EDMUND G. BROWN, JR., Governor

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD—LOS ANGELES REGION

[SEAL]

107 South Broadway, Suite 4027
Los Angeles, California 90012
(213) 620-4460

Jan. 27, 1977

City of Los Angeles
Bureau of Engineering
Room 800, City Hall
Los Angeles, California 90012

ATTENTION: Mr. Donald C. Tillman
City Engineer

RE: Waste Discharge Requirements (NPDES Permit No. CA0109991)

Gentlemen:

Reference is made to our letter lated January 14, 1977, which transmitted a copy of a tentative Order that proposed extending the expiration date of Order No. 75-100 and NPDES No. 0109991 to June 30, 1977.

In accordance with the administrative procedures, this California Regional Water Quality Control Board and the Environmental Protection Agency, held a joint public hearing on January 24, 1977. At the hearing, the Board reviewed the tentative Order and adopted Order No. 77-1 which extends the expiration date contained in Order No. 75-100 to June 30, 1977. The remainder of Order No. 75-100 remains in effect.

The representative of the Regional Administrator, EPA, recommended issuance of the amended NPDES Permit

No. CA109991 (copy attached) relative to this waste discharge.

Please note that additional Findings (Nos. 4 through 6) were added at the hearing.

If you have any questions, please call us.

Very truly yours,

Original signed by
Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

cc: See attached mailing list

Enclosures

This certifies that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, and of a National Pollutant Discharge Elimination Systems permit amendment issued by the Environmental Protection Agency, Region IX.

/s/ Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

Date: January 24, 1977

/s/ William H. Pierce
WILLIAM H. PIERCE
Chief, Permits Branch,
Enforcement Division for
the Regional Administrator

Date: January 24, 1977

California Regional Water Quality Control Board
Los Angeles Region
(213) 620-4460
Order No.
Amended Waste Dicharge Requirements

Environmental Protection Agency
Region IX
(415) 556-3450
Permit No. CA0109991
Amended Authorization to Discharge under the National Pollutant Dicharge Elimination System—Federal Water Pollution Control Act (33 U.S.C. 125 et. seq.)

FOR
CITY OF LOS ANGELES
HYPERION TREATMENT PLANT

The California Regional Water Quality Control Board, Los Angeles Region and the Regional Administrator, Environmental Protection Agency, Region IX, find that:

1. City of Los Angeles discharges wastes under requirements contained in Order No. 75-100 adopted by this Board and the Regional Administrator on August 18, 1975. On December 1, 1975, May 24, 1976, and November 22, 1976, this Regional Board adopted Orders Nos. 75-165, 76-80 and 76-202 respectively, amending the time schedules contained in Order No. 75-100. Order No. 75-100 expires on February 1, 1977.
2. City of Los Angeles has filed a report of waste discharge and applied for renewal of its waste discharge requirements and National Pollutant Discharge Elimination System Permit prior to the expiration of the current requirements and Permit.
3. Adequate review time will not be available for the tentative waste discharge requirements prior to the expiration date of the current Order.
4. The City of Los Angeles has prepared a final environmental impact report in accordance with the California Environmental Quality Act (Public Resources Code Section 21000 et. seq.).
5. The City of Los Angeles has changed or altered the project as follows:

a) Discharge of chlorinated secondary effluent out the 1-mile outfall during installation of the eductor—construction schedule has been arranged such that there should be no interruption of beach usage

b) Discharge of primary effluent during construction of secondary facilities—construction activities have been timed so that primary effluent will be discharged out the 5-mile outfall instead of the 1-mile outfall.

c) Cessation of sludge discharge to ocean-landfills utilized will have a shortened useful life —however, no other alternative is currently available. The problem is being studied by the State Water Resources Control Board and the Los Angeles/Orange Metropolitan Area Study Group.

6. The changes or alterations of the project mitigate or avoid the significant or lasting adverse environmental impacts of the project.

The Board and Regional Administrator have notified the discharger and interested agencies and persons of their intent to amend the waste discharge requirements and permit for this discharge and have provided them with an opportunity to submit their written views and recommendations.

The Board and the Regional Administrator in a public hearing heard and considered all comments pertaining to the tentative amended requirements and permit.

This National Pollutant Discharge Elimination System permit amendment shall take effect 30 days from the date of signature. The amendment to the State requirements is effective upon signature.

IT IS HEREBY ORDERED, that Order No. 75-100 adopted by this Board on August 18, 1975, and NPDES Permit No. CA0109991 issued by the Regional Administrator on August 18, 1975, shall be revised as follows:

1. The expiration date in Provision F-5 is changed from February 1, 1977, to June 30, 1977.

2. All other limitations, prohibitions, requirements, and provisions of Order No. 75-100 and NPDES Permit No. CA0109991 shall remain in full force and effect.

cc: Environmental Protection Agency, Region IX, Reional Administrator, Attn: Permits Branch
U.S. Army Corps of Engineers
State Water Resources Control Board, Legal Division
Attn: Harry M. Schueller
Department of Fish and Game, Marine Resources Region
Department of Health, Water Sanitation Section
Department of Water Resources
State Department of Parks and Recreation
Department of Navigation and Ocean Development
State Lands Division
City of Los Angeles, City Engineer
City of Los Angeles, Bureau of Engineering
City of Los Angeles, Bureau of Sanitation
County of Los Angeles, Department of Health Services
Los Angeles County Department of Parks and Recreation
Los Angeles County Engineer, Project Planning and Pollution Control Division
Los Angeles County Engineer, Sanitation Division
County Sanitation Districts of Los Angeles County
City of Santa Monica
City of El Segundo
City of Manhattan Beach
City of Hermosa Beach
City of Redondo Beach
City of Torrance
Malibu Township Council

U.S. Naval Station, Long Beach
Ocean Fish Protective Association
Izaak Walton League of America
NOAA, National Marine Fisheries Service
U.S. Fish and Wildlife Service
Division of River Basin Studies
11th District U.S. Coast Guard, Long Beach
Environmental Protection Agency, Region IX, Contact Office
U.S. Fish and Wildlife Service
Attn: Regional Director
Mr. A. F. Peppermuller
Mr. Louis Fiske
Regional Wastewater Solids Management Program
Los Angeles-Orange County Metropolitan Area

State of California
Resources Agency

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION

ORDER NO. 77-29

AN ORDER AMENDING ORDER NO. 76-80 DIRECTING THE CITY OF LOS ANGELES TO COMPLY WITH REQUIREMENTS CONTAINED IN ORDER NO. 75-100

(CI 1492) (CA0109991) (M-1492)

The California Regional Water Quality Control Board, Los Angeles Region, finds:

1. City of Los Angeles discharges an average of 340 mgd (million gallons per day) of treated municipal wastewater and approximately 160 tons per day of sewage sludge to Santa Monica Bay from its Hyperion Treatment Plant in Playa del Rey under requirements prescribed jointly on August 18, 1975, by this Board and the United States Environmental Protection Agency in Order No. 75-100 (NPDES Permit No. CA0109991).
2. On December 1, 1975, this Board adopted Order No. 75,165, amending Order No. 75-100 and the NPDES Permit by modifying the time schedule for prohibition of sludge discharge to the ocean to provide for definite dates for compliance with the tasks required to comply with the Discharge Prohibition, as specified in Provisions B-1 and B-3 of Order No. 75-100.
3. On May 24, 1976, the Regional Board adopted Order No. 76-80, directing the City of Los Angeles to comply with a revised schedule for prohibition of sludge discharge to the ocean. The Order also authorized and directed the Executive Officer to request the Attorney General and District Attorney

to take the appropriate action against the discharger, including injunction and monetary remedies, in the event the City of Los Angeles failed to comply with any provision of Order No. 76-80.

4. Item 1 of Order No. 76-80 directed in part as follows:

Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Award contract for demolition, trucks and dewatering equipment for Phases I, II, III & IV	December 1, 1976	December 15, 1976

5. On November 22, 1976, this Board adopted Order No. 76-202, revising the time schedule for compliance contained in Order No. 76-80, as follows:
   1. The time schedule for compliance contained in Item 1 is deleted, and replaced with the following:

"Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Award contract for demolition, trucks and dewatering equipment for Phases I, II, III & IV	December 1, 1976	December 15, 1976
Submit plans and specifications necessary to meet Phase I	January 1, 1977	January 15, 1977
Award contract for Phase I support System	May 1, 1977	May 15, 1977
Submit final plans and specifications for Phases II, III & IV	November 1, 1977	November 15, 1977
Award contract for Phases II, III, & IV support system	April 1, 1978	April 15, 1978

Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Complete construction of Phase I and achieve operational level	August 1, 1978	August 15, 1978
Complete construction of Phase II and achieve operational level	April 1, 1979	April 15, 1979
Complete construction of Phase III and achieve operational level	October 1, 1979	October 15, 1979
Complete construction of Phase IV and achieve operational level	April 1, 1980	April 15, 1980

City of Los Angeles shall submit to the Regional Board, the State Water Resources Control Board, and the Regional Administrator of Environmental Protection Agency on or before each compliance report date, a report on compliance or non-compliance with the specific schedule date and task.

If non-compliance is being reported, the reasons for such non-compliance shall be stated, plus an estimate of the date when City of Los Angeles will be in compliance. City of Los Angeles shall notify the Regional Board, the State Water Resources Control Board, and the Regional Administrator of Environmental Protection Agency by letter when it has returned to compliance with the time schedule."

6. On January 24, 1977, this Board and the Regional Administrator of the Environmental Protection Agency adopted Order No. 77-1, extending the expiration date of Order No. 75-100 (NPDES Permit No. CA0109991) from February 1, 1977, to June 30, 1977.

7. On December 16, 1976, the Regional Board received a report from the City of Los Angeles relative to compliance with the Task, "Award contract for

demolition, trucks and dewatering equipment for Phases I, II, III & IV". The report stated that contracts for demolition and for dewatering equipment had been awarded on December 7 and 10, 1976, respectively; but that the contract for trucks had not yet been awarded.

8. The completion date specified in Orders Nos. 76-80 and 76-202 for the Task, "Award contract for demolition, trucks and dewatering equipment for Phases I, II, III & IV" was December 1, 1976. City of Los Angeles has not complied with the completion date specified in the Orders.

9. City of Los Angeles has complied with the January 1, 1977, date specified in Order No. 76-202 for completion of the Task, "Submit plans and specifications necessary to meet Phase I".

10. Delay in awarding the contract for trucks for Phases I, II, III & IV will not affect compliance with the completion for the Task, "Complete construction of Phase I and achieve operational level", nor will it affect compliance with later completion dates for subsequent Tasks, provided the necessary trucks for each Phase are available before completion of construction for that Phase.

By letter dated February 11, 1977, the Board has notified the discharger and interested persons of its intent to conduct a public hearing concerning violation or threatened violation of requirements, and plans and time schedules for obtaining compliance.

The Board in a public hearing heard and considered all testimony pertinent to the matter.

All Orders referred to above and records of hearings and testimony therein are included herein by reference.

IT IS HEREBY ORDERED, that Order No. 76-80 adopted by this Board on May 24, 1976, is amended as follows:

A. The time schedule for compliance contained in Item 1 is deleted, and replaced with the following:

"Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Award contract for Phase I support system	May 1, 1977	May 15, 1977
Submit final plans and specifications for Phases II, III & IV	November 1, 1977	November 15, 1977

"Task	Completion Date Not Later Than	Report of Compliance Not Later Than
Award contract for Phases II, III, & IV support system	April 1, 1978	April 15, 1978
Complete construction of Phase I and achieve operational level	August 1, 1978	August 15, 1978
Complete construction of Phase II and achieve operational level	April 1, 1979	April 15, 1979
Complete construction of Phase III and achieve operational level	October 1, 1979	October 15, 1979
Complete construction of Phase IV and achieve operational level	April 1, 1980	April 15, 1980

City of Los Angeles shall submit to the Regional Board, the State Water Resources Control Board, and the Regional Administrator of Environmental Protection Agency on or before each compliance report date, a report on compliance or non-compliance with the specific schedule date and task.

If non-compliance is being reported, the reasons for such non-compliance shall be stated, plus an estimate of the date when City of Los Angeles will be in compliance. City of Los Angeles shall notify the Regional Board, the State Water Resources Control Board, and the Regional Administrator of Environmental Protection Agency by letter when it has returned to compliance with the time schedule."

B. City of Los Angeles shall assure that all trucks necessary to conduct routine operations for each Phase are on hand and ready prior to completion of construction of that Phase. To this end, City of Los Angeles shall submit to the Regional Board, the State Water Resources Control Board, and the Regional Administrator of the Environmental Protection Agency reports of progress relative to obtaining the necessary trucks for each Phase in accordance with the following schedule:

Task	Due Not Later Than
Progress Report, Phase I	January 15, 1978
Progress Report, Phase I	April 15, 1978
Progress Report, Phase I	July 15, 1978
Progress Report	January 15, 1979
Progress Report	July 15, 1979
Progress Report	January 15, 1980

C. All other parts of Order No. 76-80 shall remain in full force and effect.

D. Order No. 76-202, adopted November 22, 1976, is hereby rescinded.

I, Raymond M. Hertel, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on February 28, 1977.

/s/ Raymond M. Hertel,
RAYMOND M. HERTEL,
Executive Officer

I, Richard A. Harris, am Assistant Executive Officer of the California Regional Water Quality Control Board, Los Angeles Region, and certify that this record is a true and complete copy of the original document.

/s/ Richard A. Harris
RICHARD A. HARRIS

WILLIAM D. KELLER
United States Attorney
BARRY TRILLING
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 798-2450

DAVID R. ANDREWS
Regional Counsel
ANTHONY O. GARVIN
Assistant Regional Counsel
U.S. Environmental Protection Agency
100 California Street
San Francisco, California 94111
Telephone: (415) 556-2068

Attorneys for Defendants John R. Quarles, Jr., Paul DeFalco, Jr., and U.S. Environmental Protection Agency

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. 77-0521 HP

PACIFIC LEGAL FOUNDATION, ET AL., PLAINTIFF

v.

JOHN R. QUARLES, JR., ET AL., DEFENDANTS

AFFIDAVIT OF PAUL DE FALCO, JR.

STATE OF CALIFORNIA)
) SS
COUNTY OF SAN FRANCISCO)

Paul De Falco, Jr. being duly sworn, deposes and says:

1. I am the Regional Administrator, Region IX, United States Environmental Protection Agency (EPA), San Francisco, California. In my capacity as Regional

Administrator, I am the chief executive officer for EPA in Region IX and am responsible for administration of EPA's programs in Arizona, California, Hawaii, Nevada, Guam, American Samoa, and the Trust Territories.

2. Under Title II of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1281 *et seq.*, the Administrator of EPA is authorized to award grants to municipalities for construction of wastewater treatment facilities. The authority of the Administrator of EPA to award grants under Title II of FWPCA has been delegated by the Administrator to the Regional Administrators of EPA.

3. Under an agreement signed May 23, 1975, general administration of the construction grant program of Title II of FWPCA was delegated to the California State Water Resources Control Board (SWRCB). The agreement, however, did not delegate to the SWRCB the actual authority to award Federal construction grants. The final decision making authority for award of Federal construction grants in California is thus my responsibility as Regional Administrator.

4. On August 22, 1975, the City of Los Angeles submitted an application for a grant under Title II of FWPCA, for construction of an interim sludge processing and disposal system for the Hyperion treatment plant. The City had previously submitted a Project Report to EPA in 1975 which discussed the feasibility of the Interim Sludge Project.

5. The proposed Interim Sludge Disposal Project is designed to eliminate the discharge of sewage sludge to the ocean from the Hyperion plant until an ultimate solution for the disposal of sludge is developed. The City of Los Angeles is presently a participant in a cooperative effort with Los Angeles County and Orange County to develop a facilities plan and joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) regarding alternatives for the ultimate disposal of sewage sludge. This effort is partially funded by a grant from EPA under Title II of FWPCA.

6. In accordance with EPA's Guidelines for Compliance with NEPA in the Title II Wastewater Treatment

Works Construction Grants Program (40 C.F.R. § 6.512), EPA prepared an Environmental Impact Appraisal for the Interim Sludge Disposal Project which was issued on November 18, 1976. (Attachment Q, Memorandum in Support of Motion To Dismiss). The Environmental Impact Appraisal contained a discussion of the anticipated impact of the project on the environment, a discussion of mitigation measures to be taken, and a dission of alternatives to the proposed project.

7. On the basis of the Environmental Impact Appraisal and the EIR prepared by the City of Los Angeles, EPA issued a Negative Declaration on November 18, 1976, regarding the environmental impact of the Hyperion interim sludge project. (Attachment P, Memorandum in Support of Motion to Dismiss). The Negative Declaration stated that it was EPA's conclusion that the proposed project would not have significant environmental impacts and that EPA had made a preliminary decision not to prepare an Environmental Impact Statement.

8. The City of Los Angeles is presently developing a facilities plan covering all aspects of future wastewater treatment, which is referred to as the City of Los Angeles Wastewater Facilities Plan. This plan will include a detailed discussion of alternative means of achieving effluent limitations based upon secondary treatment at the City's existing treatment facilities and a discussion of the Interim Sludge Disposal Project. The City and EPA are also developing a joint EIR/EIS covering the environmental impact of the City of Los Angeles Wastewater Facilities Plan. Preparation of the plan and the joint EIR/EIS is partially funded by a grant from EPA under Title II of FWPA.

9. The EIR/EIS for the City of Los Angeles Wastewater Facilities Plan will include a detailed analysis of the potential environmental impact of the Interim Sludge Disposal Project. This analysis will include a discussion of alternatives to the Interim Sludge Disposal Project and a discussion of the environmental impacts of the present disposal of sludge to the ocean.

10. In view of the controversy regarding the Hyperion Interim Sludge Project which arose subsequent to the issuance of the Negative Declaration and Environmental Impact Appraisal, I have decided that EPA should not award a grant to the City of Los Angeles for construction of the project until the public has had a further opportunity to comment on the environmental impact of the project. I have, therefore, directed that no action should be taken on the grant application submitted by the City of Los Angeles for the Hyperion Interim Sludge Project until the requirements of the National Environmental Policy Act have been satisfied with respect to the EIR/EIS for the City of Los Angeles Wastewater Facilities Plan.

/s/ Paul De Falco, Jr.
PAUL DE FALCO, JR.

Subscribed and sworn to before me this 18th day of April, 1977.

/s/ Melinda Taflin
Notary Public

My Commission expires July 6, 1980.

CERTIFICATE OF SERVICE BY MAIL

I, Queen E. Sirls, declare: That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of the United States Attorney, United States Court House, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action; That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on April 22, 1977, I deposited in the United States Mails, in the United States Court House, 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Affidavit of Paul De Falco, Jr. addressed to:

Thomas E. Hookano, Esq.
Capitol Mall
Suite 465
Sacramento, Calif.
Plaintiff's Attorney

Stanley E. Remelmeyer, Esq.
City Attorney
3031 Torrance Blvd.
Torrance, Calif. 90503

Emil Stipanovich
Deputy Attorney General
3580 Wilshire Blvd.
Los Angeles, Ca. 90003

their last known address, at which place there is a delivery service by United States Mail.

This Certificate is executed on April 22, 1977, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Queen E. Sirls
QUEEN E. SIRLS

CERTIFICATE OF SERVICE BY MAIL

I, Barbara Gordon, certify as follows:

I am a citizen of the United States, residing or employed in Sacramento, California;

My business address is 455 Capitol Mall, Suite 465, Sacramento, California;

I am over the age of eighteen years, and am not a party to the above entitled action;

On November 3, 1977, true copies of the REPLY MEMORANDUM IN OPPOSITION TO MOTION FOR STAY PENDING REVIEW were placed in envelopes addressed to:

JAMES W. MOORMAN
Assistant Attorney General
ANGUS MACBETH
Chief, Pollution Control Section
RAYMOND W. MUSHAL
Attorney
Pollution Control Section
Department of Justice
Washington, D.C. 20530

BURT PINES, Esquire
City Attorney
21st Floor, City Hall
Los Angeles, CA 90012

RICHARD TERZIAN, Esquire
Burke, Williams and Sorensen
707 Wilshire Boulevard
Los Angeles, CA 90012

Regional Counsel
Environmental Protection Agency
Region 9
100 California Street
San Francisco, CA 94111

STANLEY E. REMELMEYER
City Attorney
3031 Torrance Boulevard
Torrance, CA 90503

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mail box regularly maintained by the United States Government in Sacramento, California.

Executed on November 3, 1977, at Sacramento, California.

/s/ Barbara Gordon
BARBARA GORDON

[EMBLEM]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region IX
100 California Street
San Francisco, California 94111

In reply refer to:
E-4-1 869.2D

Mr. Warren A. Hollier, President
Board of Public Works
200 N. Spring Street, Room 353
Los Angeles, Ca. 90012

Apr. 26, 1977

Dear Mr. Hollier:

In accordance with the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the Environmental Protection Agency, Region IX, issued the following National Pollutant Discharge Elimination System (NPDES) Permit to:

Discharger	NPDES No.
Hyperion Treatment Plant	CA0109991

Since then, modifications to the permit have been proposed. A copy of the Public Notice of these proposed modifications is enclosed. Comments on the proposed modifications, or a request for a public hearing may be submitted to this office within thirty (30) days following the date of this Public Notice. Should the Regional Administrator find a significant degree of public interest exists, a public hearing shall be held.

If no hearing is held, we expect to issue the permit modifications shortly after the expiration date of the thirty (30) day comment period. Should you have any

questions concerning this matter, please contact our Permits Branch at 415-556-3450.

Sincerely,

/s/ William H. Pierce
WILLIAM H. PIERCE
Chief, Permits Branch
Enforcement Division

Enclosures:

cc: California RWQCB—Los Angeles, Central Coast
U.S. Fish and Wildlife Service, Laguna Niguel
Corps of Engineers, Los Angeles
11th Coast Guard District
National Marine Fisheries Service,
Terminal Island, Ca.

[EMBLEM]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region IX
100 California Street
San Francisco, California 94111

NOTICE OF PROPOSED ACTION

by the

U.S. Environmental Protection Agency
Region IX
100 California Street
San Francisco CA 94111

415/556-3450

on Modification of a National Pollutant Discharge Elimination System Permit to Discharge Pollutants to Waters of the United States

Public Notice

C-77-18-W(M)

April 27, 1977

On December 18, 1974, the Regional Administrator, Region IX, Environmental Protection Agency, issued a National Pollutant Discharge Elimination System (NPDES) permit to the following discharger:

City of Los Angeles—Hyperion Treatment Plant
200 N. Spring Street
Los Angeles, Ca. 90012
NPDES Permit No. CA0109991

The City of Los Angeles operates a municipal wastewater treatment plant located at 12000 Vista Del Mar, Playa Del Rey, Los Angeles, California. All wastewater receives primary treatment at the plant. Approximately

thirty percent receives additional secondary treatment by the activated sludge process. Sludge is digested anaerobicly. Three existing discharge points to the Pacific Ocean are used. The combined treated effluent (primary and secondary) is discharged through the first. This outfall terminates 26,525 feet offshore in 187 feet of water. The enter of the discharge point is located at coordinates: latitude 33°54′45″ N, and longitude 118° 31′15″ W. The second outfall discharges secondary effluent during emergencies; it is flushed weekly with secondary effluent in routine maintenance operations. This outfall terminates 5360 feet offshore in 50 feet of water. The discharge point has coordinates: latitude 33°55′05″ N, and longitude 118°26′52″ W. The third outfall discharges digested sludge which has been diluted with secondary effluent. This outfall terminates 35,570 feet offshore in 300 feet of water at coordinates: latitude 33°55′35″ N, and longitude 118°33′15″ W.

The beneficial uses of the receiving waters are:

Nearshore Zone: (includes water generally less than 18 feet deep or those waters within 1,000 feet of the shoreline): aesthetic enjoyment; ocean water contact sport (swimming, surfing, skindiving); propagation and sustenance of marine life, including kelp and shore birds; shellfish harvesting; scientific research and training; sport fishing; commercial fishing; pleasure boating; commercial and naval shipping; and industrial water supply.

Offshore Zone: (includes all waters located between the nearshore zone and the seaward boundary of the Region): aesthetic enjoyment; propagation and sustenance of marine life; scientific research and training; sport fishing; commercial fishing; pleasure boating; commercial and naval shipping; and industrial water supply.

The Regional Administrator proposes to extend the expiration date of the permit from June 30, 1977 to December 17, 1979. All other terms and conditions of the permit would remain unchanged.

Persons wishing to comment upon objections to the proposed modification(s), or request a public hearing pursuant to 40 CFR 125.34 should submit their comments or requests in writing within thirty (30) days from the date of this notice, either in person or by mail to:

U.S. Environmental Protection Agency
Region IX, Enforcement Division, ENPPN
100 California Street
San Francisco CA 94111

Telephone: 415/556-3450

All comments or objections received within thirty (30) days from the date of this notice, will be retained and considered in the formulation of the final determinations regarding the permit modification(s). When public interest warrants, the Regional Administrator may grant an extension of the thirty (30) day comment period for the submittal of comments or objections. If written comments indicate a significant degree of public interest in a proposed modification, the Regional Administrator shall hold a public hearing in accordance with 40 CFR 125.34. A public notice of such hearing will be issued not less than thirty (30) days prior to the hearing date.

If no public hearing is held and the final determinations of the Regional Administrator, after consideration of all comments and objections, are substantially unchanged from the tentative determinations, the Regional Administrator shall forward a copy of the final determinations to the permittee and to any person who has submitted written comments regarding the permit modification.

If no public hearing is held and the final determinations of the Regional Administrator are substantially changed from the tentative determinations, the Regional Administrator will give public notice of such determinations. The Regional Administrator shall forward a copy of the notice and a copy of the final determinations to the permittee and to any person who has submitted written comments regarding the permit modification.

The permit modification(s) will be considered issued thirty (30) days following the date they are signed by the Regional Administrator. The permit modification(s) will become effective thirty (30) days following the date they are signed by the Regional Administrator, unless he grants a written request for an adjudicatory hearing. Requests for an adjudicatory hearing must be filed within ten (10) days following the receipt of the final determinations and must meet the requirements of 40 CFR 125.36. All written requests for adjudicatory hearings should be addressed to the Regional Administrator, Environmental Protection Agency, Region IX, Attn: Regional Hearing Clerk, 100 California Street, San Francisco CA 94111.

If the Regional Administrator grants a request for an adjudicatory hearing, he shall give public notice of such hearing. Any person may submit a request to be admitted as a party within thirty (30) days after the publication date of the public notice of an adjudicatory hearing. If no adjudicatory hearing is requested, the permit modification will be issued or denied, as appropriate, and this action will be final.

The proposed modification, fact sheets if required, comments received, and other information are on file and may be copied at:

U.S. Environmental Protection Agency
(address and telephone number indicated above)

A copy of the proposed modification, fact sheets if required, and further information may be obtained by writing to the Regional Office of EPA at the above address or by calling the Permits Branch, Enforcement Division at 415/556-3450.

Please bring the foregoing notice to the attention of all persons whom you know would be interested in this matter.

[EMBLEM]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region IX
100 California Street
San Francisco, California 94111

In Reply E-5
Refer to: 863.

Warren A. Hollier, President
Board of Public Works
City of Los Angeles
373 City Hall
Los Angeles CA 90012

Dear Mr. Hollier:

We have reviewed the Board's request of April 4, 1977, for modifications to the compliance schedules for the interim sludge project and the secondary treatment project at the Hyperion Treatment Plant (NPDES Permit No. CA0109991).

The pertinent Federal Regulations (40 CFR 125.23(d)) provide that:

> "The Regional Administrator may, upon request of the applicant, and after public notice, revise or modify a schedule of compliance in an issued permit if he determines good and valid cause (such as an act of God, strike, flood, materials shortage, or other event over which the permittee has little or no control) exists for such revision."

Since we have no knowledge that such good and valid cause exists with respect to the City of Los Angeles, your request for permit modification cannot be granted.

If you have any question regarding this matter, please contact this office, at 415/556-7450.

Sincerely,

R. L. O'Connell

cc: Donald Tillman
LA RWQCB
CA WRCB

STATE OF CALIFORNIA—RESOURCES AGENCY

EDMUND G. BROWN, JR., Governor

[EMBLEM]

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD—LOS ANGELES REGION

107 South Broadway, Suite 4027
Los Angeles, California 90012
(413) 620-4460

May 2, 1977

City of Los Angeles
Bureau of Engineering
Room 800, City Hall
Los Angeles, California 90012

ATTENTION: Mr. Donald C. Tillman, City Engineer

RE: Tentative Waste Discharge Requirements
Hyperion Treatment Plant (NPDES No. CA0109991)

Gentlemen:

At its next regular public hearing, the California Regional Water Quality Control Board, Los Angeles Region, will consider extending the expiration date of Order No. 75-100 (NPDES Permit No. CA0109991) to December 17, 1979.

The hearing will be held on May 23, 1977, at 10:00 a.m., 107 South Broadway, Room 1138, Los Angeles, California.

Very truly yours,

Original signed by
Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

cc: See attached mailing list

Enclosures

MAILING LIST

Regional Board Members
Environmental Protection Agency, Region IX
Regional Administrator, Attn: Permits Branch
Environmental Protection Agency, Region IX,
Enforcement Division
U. S. Army Corps of Engineers
State Water Resources Control Board, Legal Division
Department of Fish and Game, Marine Resources Region
Department of Health, Water Sanitation Section
Department of Water Resources
Department of Parks and Recreation
Department of Navigation and Ocean Development
State Lands Division
City of Los Angeles, City Council
City of Los Angeles, City Engineer
City of Los Angeles, Bureau of Engineering
City of Los Angeles, Bureau of Sanitation
City of Los Angeles, Wastewater Systems
Engineering Division
County of Los Angeles, Department of Health Services
Los Angeles County Department of Parks and Recreation
Los Angeles County Engineer, Project Planning and
Pollution Control Division
Los Angeles County Engineer, Sanitation Division
County Sanitation Districts of Los Angeles County
City of Santa Monica
City of El Segundo
City of Manhattan Beach
City of Hermosa Beach
City of Redondo Beach
City of Torrance
Malibu Township Council
U. S. Naval Station, Long Beach
Ocean Fish Protective Association
Izaak Walton League of America
NOAA, National Marine Fisheries Service
U. S. Fish and Wildlife Service
Division of Riven Basin Studies
11th District U.S. Coast Guard, Long Beach

Environmental Protection Agency, Region IX, Contract
Office
U.S. Fish and Wildlife Service, Attn: Regional Director
Mr. A. F. Peppermuller
Mr. Louis Fiske
Regional Wastewater Solids Management Program
Los Angeles-Orange County Metropolitan Area
California Regional Water Quality Control Board,
Santa Ana Region
California Regional Water Quality Control Board,
Central Coast Region

PUBLIC VOUCHER FOR ADVERTISING

For Agency Use Only	
VOUCHER NUMBER	
SCHEDULE NUMBER	24127
PAID BY	

DEPARTMENT OR ESTABLISHMENT, BUREAU OR OFFICE: ENVIRONMENTAL PROTECTION AGENCY

PLACE VOUCHER PREPARED: LOS ANGELES

DATE PREPARED: 5/3/77

NAME OF PUBLICATION: LOS ANGELES TIMES

NAME OF PUBLISHER OR REPRESENTATIVE: ANNE J HURLEY, CLASSIFIED ACCOUNTING

ADDRESS (Street, room number, city, State, and ZIP code): TIMES MIRROR SQ LOS ANGELES CALIF. 90053

CHARGES

TYPEFACE (size of type) POINT PER (inch, square, word, or folio)

LINE RATES

	NUMBER OR LINES (Indicate counted or space)	COST PER LINE	TOTAL COST
FIRST INSERTION	332	$ 3.10	$ 1,029.20
ADDITIONAL INSERTIONS GIVE NUMBER ▶			
TOTAL			$ 1,029.20

UNIT RATES

	NUMBER OF UNITS (Indicate inch, square, word, folio)	COST PER UNIT	TOTAL COST
FIRST INSERTION		$	$
ADDITIONAL INSERTIONS GIVE NUMBER ▶			
TOTAL			$

Attach one copy of advertisement (including upper and lower rules) to each copy of voucher here. If copy is not available sign the following affidavit.

TOTAL LINE RATES AND OTHER RATES	
LESS DISCOUNT AT %	
BALANCE DUE	$ 1029.20
VERIFIED (Initials)	

AFFIDAVIT

This represents a true billing for the attached advertising order, with specifications and copy, which has been completed.

SIGNATURE OF PUBLISHER OR REPRESENTATIVE: anne J. Hurley

TITLE: classified accounting DATE: 5/3/77

FOR AGENCY USE ONLY

ADVERTISEMENT PUBLISHED IN | DATE PUBLISHED

I certify that the advertisement described above appeared in the named publication and that this account is correct and eligible for payment.

SIGNATURE AND TITLE OF CERTIFYING OFFICER | DATE

SIGNATURE AND TITLE OF AUTHORIZING OFFICER | DATE

ACCOUNTING CLASSIFICATION | PAID BY CHECK NUMBER

6870106 RA0106 768009K001 2540 EST: $500.00

[1] If the ability to certify and authority to approve are combined in one person enter "N/A" (not applicable) here.

U.S. GPO: 1974—559-598

September 1973
4 Treasury FRM 2000 Standard Form 1143

ADVERTISING ORDER

AO-77-0320
ORDER NUMBER

DEPARTMENT OR ESTABLISHMENT, BUREAU OR OFFICE
US ENVIRONMENTAL PROTECTION AGENCY - REGION IX

DATE
04/26/77

The publisher of the publication named below is authorized to publish the enclosed advertisement according to the schedule below provided the rates are not in excess of the commercial rates charged to private individuals with the usual discounts. It is to be set solid, without paragraphing, and without any display in the heading unless otherwise expressly authorized in the specifications.

LOS ANGELES TIMES - Times Mirror Co., Times Mirror Square - Los Angeles, Ca. 90053
NAME OF THE PUBLICATION ADVERTISED IN

SUBJECT OF ADVERTISEMENT	EDITION OF PAPER ADVERTISEMENT APPEARED
PUBLIC NOTICE #C-77-18-W(M)	LEGAL CLASSIFIED
NUMBER OF TIMES ADVERTISEMENT APPEARED	DATE(s) ADVERTISEMENT APPEARED
ONE (1)	04/27/77

SPECIFICATIONS FOR ADVERTISEMENT

PLEASE NOTE: IMPORTANT ******
PAYMENT CAN NOT BE MADE UNTIL BACK OF THIS FORM IS COMPLETED.
ALSO SUBMIT TWO (2) COPIES OF AFFIDAVIT OF PUBLICATION.

COPY FOR ADVERTISEMENT

***** SEE ATTACHED *****

AUTHORITY TO ADVERTISE	INSTRUMENT OF ASSIGNMENT
NUMBER: EPA ORDER 1210.5a	NUMBER: N/A
DATE: December 13, 1973	DATE: N/A
SIGNATURE OF AUTHORIZING OFFICIAL: [signature] 4/26/77	TITLE: Acting Chief, Support Services Branch

INSTRUCTIONS TO PUBLISHERS

Extreme care should be exercised to insure that the specifications for advertising to be set other than solid be definite, clear, and specific since no allowance will be made for paragraphing or for display or leaded or prominent headings, unless specifically ordered, or for additional space required by the use of type other than that specified. Specifications for advertising other than solid and the advertisement copy submitted to the publisher will be attached to the voucher. The following is a sample of solid line advertisement set up in accordance with the usual Government requirements.

DEPARTMENT OF HIGHWAYS & TRAFFIC. D.C. Bids are requested for first spring 1966 cement concrete repair contract, including incidental work, Washington, D.C., Invitation No. C-6676-H, consisting of 11,000 sq. yds. PCC Class BB sidewalk repair and 2,000 cu. yds. PCC Class A pavement, alley, & driveway repair, both cut repairs only. Bidding material available from the Procurement Officer, D.C. Sealed bids to be opened in the Procurement Office at 3:00 p.m., November 15, 1966.

Your bill for this advertising order should be submitted on the "Public Voucher for Advertising" form, which is printed on the reverse of this form, immediately after the last publication of the advertisement. If copies of the printed advertisement are not available, complete the affidavit provided on the voucher. Submit the voucher and a copy of the printed advertisement to ▶.....

US ENVIRONMENTAL PROTECTION AGENCY
100 California Street
San Francisco, Ca. 94111 ATTN: PROCUREMENT

IMPORTANT

Charges for advertising when a cut, matrix, stereotype or electrotype is furnished will be based on actual space used and no allowance will be made for shrinkage.

In no case shall the advertisement extend beyond the date and edition stated in this order.

1143-107

NOTICE OF PROPOSED ACTION

by the

U.S. Environmental Protection Agency
Region IX
100 California Street
San Francisco, CA 94111

415/556-2450

on Modification of a National Pollutant Discharge Elimination System Permit to Discharge Pollutants to Waters of the United States

Public Notice
C-77-15-W(M)
April 27, 1977

On December 16, 1974, the Regional Administrator, Region IX, Environmental Protection Agency, issued a National Pollutant Discharge Elimination System (NPDES) permit to the following discharger:

City of Los Angeles—Hyperion Treatment Plant
200 N. Spring Street
Los Angeles, Ca. 90012
NPDES Permit No. CA0109991

The City of Los Angeles operates a municipal wastewater treatment plant located at 12000 Vista Del Mar, Playa Del Rey, Los Angeles, California. All wastewater received primary treatment at the plant. Approximately thirty percent receives additional secondary treatment by the activated sludge process. Sludge is digested anaerobicly. Three existing discharge points to the Pacific ocean are used. The combined treated effluent (primary and secondary) is discharged through the first. This outfall terminates 20,525 feet offshore in 187 feet of water. The center of the discharge point is located at coordinates: latitude 33°54'45" N, and longitude 118°31'815" W. The second outfall discharges secondary effluent during emergencies; it is flushed weekly with secondary effluent in routine maintenance operations. This outfall terminates 5330 feet offshore in 50 feet of water. The discharge point has coordinates: latitude 33°56'05" N, and longitude 118°26'32" W. The third outfall discharges digested sludge which has been diluted with secondary effluent. This outfall terminates 21,570 feet offshore in 200 feet of water at coordinates: latitude 33°55'28" N, and longitude 118°25'15" W.

The beneficial uses of the receiving waters are:

NEARSHORE ZONE: (Includes water generally less than 18 feet deep or those waters within 1,000 feet of the shoreline): aesthetic enjoyment; ocean water contact sport (swimming, surfing, skindiving); propagation and sustenance of marine life, including kelp and shorebirds; shellfish harvesting; scientific research and training; sport fishing; commercial fishing; pleasure boating; commercial and naval shipping; and industrial water supply.

OFFSHORE ZONE: (Includes all waters located between the nearshore zone and the seaward boundary of the Region): aesthetic enjoyment; propagation and sustenance of marine life; scientific research and training; sport fishing; commercial fishing; pleasure boating; commercial and naval shipping; and industrial water supply.

The Regional Administrator proposes to extend the expiration date of the permit from June 30, 1977 to December 17, 1979. All other terms and conditions of the permit would remain unchanged.

Persons wishing to comment upon or object to the proposed modification(s), or request a public hearing pursuant to 40 CFR 125.34 should submit their comments or requests in writing within thirty (30) days from the date of this notice, either in person or by mail to:

U.S. Environmental Protection Agency
Region IX, Enforcement Division, ENP2N
100 California Street
San Francisco, CA 94111

Telephone: 415/556-2450

All comments or objections received within thirty (30) days from date of this notice, will be retained and considered in the formulation of the final determinations regarding the permit modification(s). When public interest warrants, the Regional Administrator may grant an extension of the thirty (30) day comment period for the submittal of comments or objections. If written comments indicate a significant degree of public interest in a proposed modification, the Regional Administrator shall hold a public hearing in accordance with 40 CFR 125.34. A public notice of such hearing will be issued not less than thirty days prior to the hearing date.

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If the Regional Administrator grants a request for an adjudicatory hearing, he shall give public notice of such hearing. Any person may submit a request to be admitted as a party within thirty (30) days after the publication date of the public notice of an adjudicatory hearing. If no adjudicatory hearing is requested, the permit modification will be issued or denied, as appropriate, and this action will be final.

The proposed modification, fact sheets if required, comments received, and other information are on file and may be copied at:

U.S. Environmental Protection Agency
(address and telephone number indicated above)

A copy of the proposed modification, fact sheets if required, and further information may be obtained by writing to the Regional Office of EPA at the above address or by calling the Permit Branch, Enforcement Division at 415, 556-2450.

Please bring the foregoing notice to the attention of all persons whom you know would be interested in this matter.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE HARRY PREGERSON,
JUDGE PRESIDING

Civil No. 77-0521-HP

PACIFIC LEGAL FOUNDATION, ET AL., PLAINTIFFS

vs.

JOHN R. QUARLES, JR., ET AL., DEFENDANTS

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, May 23, 1977

SAMUEL GOLDSTEIN
Official Reporter
United States District Court
Los Angeles, California 90012
Telephones: 622-1678 and 622-2903

APPEARANCES:

For the Plaintiffs:

PACIFIC LEGAL FOUNDATION
By: Thomas E. Hookano
and
ROBERT K. BEST
455 Capitol Mall, Suite 465
Sacramento, California 95814

For the City of Torrance:

ROGER FREEMAN
3031 Torrance Boulevard
Torrance, California 90503

For the Federal Defendants:

WILLIAM D. KELLER
United States Attorney
By: BARRY J. TRILLING
Assistant United States Attorney
312 North Spring Street
Los Angeles, California 90012
and
ENVIRONMENTAL PROTECTION AGENCY
REGIONAL COUNSEL
By: ANTHONY O. GARVIN

For the State of California Defendants:

EVELLE J. YOUNGER
Attorney General
By: EMIL STIPANOVICH, JR.
Deputy Attorney General
800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, California 90010

[3] LOS ANGELES, CALIFORNIA;
MONDAY, MAY 23, 1977; 3:10 P.M.

THE COURT: Call the calendar.

THE CLERK: No. 15 on calendar. Civil No. 77-521-HP, Pacific Legal Foundation, et cetera, et al., vs. John R. Quarles, Jr., et cetera, et al.

Your Honor, this matter is on the Court's calendar this afternoon for hearing plaintiffs' application for preliminary injunction. That application was filed on March 29, 1977.

Counsel will please state their appearance for the record.

MR. HOOKANO: Thomas Hookano for plaintiffs.

MR. BEST: Robert Best for plaintiffs.

MR. FREEMAN: Roger Freeman for plaintiff City of Torrance.

MR. TRILLING: Good afternoon, your Honor. For the federal defendants, Assistant United States Attorney Barry Trilling; and Environmental Protection Agency, Anthony Garvin.

MR. STIPANOVICH: For the State defendants, Emil Stipanovich, Jr., Deputy Attorney General.

THE COURT: Very well.

Mr. Best, do you want to address these questions, or Mr. Hookano?

MR. BEST: Mr. Hookano will, your Honor.

[4] THE COURT: All right. Fine.

MR. HOOKANO: Your Honor, would you like the questions read into the record?

THE COURT: Well, I will give the clerk a copy of the questions for the Government and questions for the plaintiffs, and I will ask him to insert those questions in the record at this point as though they had been read in full, so that will obviate the need to read those questions into the record.

> (Question No. 4 from the list entitled "Questions for Plaintiffs," which was handed to the reporter appears in the following words and figures, to wit:"

"Even if an EIS is required for the EPA's funding of the Hyperion project, why should a remedy on that cause of action include an injunction against enforcement of Hyperion's permit? Under the Act, isn't enforcement of pollution standards in permits independent from and not contingent upon the availability of federal funding?

"If the permit was held up pending an EIS as to the grant, wouldn't the court be overruling the Water Act's exemption from NEPA for permits and effluent limitations?

"Even if it seems anomalous to require an [5] EIS pending federal funding of a project while leaving the EPA free to enforce orders requiring the project's completion without federal funds, doesn't that result stem from the plain meaning of Section 511?")

MR. HOOKANO: The question, now, in summary form is, why should a remedy on plaintiffs' cause of action which relates to the request for an injunction pending completion of an EIS on the funding of the conversion of the Hyperion project, why should this injunction if issued act against enforcement of the Hyperion permit.

I think the response to that question first calls for an understanding of the project that we are seeking to enjoin. That project is the physical conversion of the Hyperion plant to faciliate interim sludge processing.

That project also consists of the federal and state defendants' requirement that that project take place.

THE COURT: Why don't you just take the questions and answer them, without paraphrasing them. I think it would be more manageable that way.

Question 4, do you have that in mind?

MR. HOOKANO: Yes.

THE COURT: Why don't you answer that?

MR. HOOKANO: The response is that we are not challenging the permit issued for the Hyperion plant. We are [6] challenging the conversion project. We are not seeking to upset the effluent limitations or any of the water quality standards set for operation of that plant.

So the injunction would go towards the implementation of the requirements—

THE COURT: One of the questions there is this:

"Under the Act, isn't enforcement of pollution standards in permits independent from and not contingent upon the availability of federal funding?"

MR. HOOKANO: The answer to that question is, Yes.

THE COURT: All right.

MR. HOOKANO: But that is not what we are seeking here.

THE COURT: What I am seeking is your answers to the questions.

MR. HOOKANO: The answer to that question is, Yes.

THE COURT: All right.

Why don't you answer the question that precedes that one?

MR. HOOKANO: Again, your Honor, we are not seeking an injunction on the permit itself. We are seeking an injunction as to the conversion of the plant, and that plant conversion is a physical project; it is not an injunction relating to water quality standards or the effluent limitations contained in the permit.

That's about as simply as I could state it.

[7] We are talking about the physical conversion of that plant, and the implementation of capital expenditures to install centrifuges, to purchase trucks, and the related activity. That is the project. It is not an injunction going towards enjoining the provisions in the permit setting forth quality standards.

THE COURT: You are not seeking an injunction against enforcement of Hyperion's permit?

MR. HOOKANO: No, we are not.

THE COURT: All right.

Earlier when I referred to the clerk, I meant the court reporter.

We have been dealing now with Question 4.

MR. HOOKANO: May I qualify my answer regarding the permit?

THE COURT: Yes.

MR. HOOKANO: There is something I wanted to add.

One thing is that it may be the conversion project is deemed a portion of the NPDS permit.

Insofar as we are seeking an injunction, we are not seeking an injunction as to the water quality standards or the effluent limitations.

If the conversion project is a part of the permit, then we are seeking to enjoin that portion of the permit, but only that portion of the permit.

[8] THE COURT: Why don't you answer the next question of 4?

MR. HOOKANO: Your Honor, the no-project alternative would vary in different locations, and, again, would not be a prohibition on implementation of the uniform secondary treatment standards.

I think I might give an example. There are several ways that the federal defendants could apply a uniform secondary treatment standard, but yet the no-project alternative, or variation of no-project alternative—

THE COURT: Wait a second. I am going to have to read these into the record, because I can't direct your attention to the questions that I want answered.

I am looking at the question now that reads—this is part of 4:

"If the permit was held up pending an EIS as to the grant, wouldn't the court be overruling the Water Act's exemption from NEPA for permits and effulent limitations?"

That's the next question you are to answer.

MR. HOOKANO: I don't believe it would, your Honor, because it is contemplated that for funding projects that there would be a NEPA statement, and that is integrated into the Act.

It was conceived, I believe, by Congress, that when [9] there would be funding of a particular project to implement the standards contained in the permit, that there would be a NEPA statement. The two could be harmonized; the two actions could be harmonized.

THE COURT: The next question which is part of 4 reads:

"Even if it seems anomalous to require an EIS pending federal funding of a project while leaving the EPA free to enforce orders requiring the project's completion without federal funds, dosen't that result stem from the plain meaning of Section 511?"

MR. HOOKANO: Again, your Honor, I am not sure that that result is required by the Act, by the Water Act. If the EPA is going to issue funds for a particular implementation project, then I think it is contemplated that an EIS would be prepared for that project, and that would not—that would be more consistent with carrying out the meaning of Section 511.

THE COURT: Go to 5 and just answer the first part of 5.

(Question No. 5 from the list entitled "Questions for Plaintiffs," which was handed to the reporter, appears in the following words and figures, to wit: "If everytime an EIS were done on proposed [10] funding for a sewage plant project, that EIS had to include all alternatives including 'no project,' then wouldn't every EIS have to reevaluate the EPA's definition of secondary treatment according to the needs of the particular locale of the sewage treatment plant? Wouldn't that destroy the concept of a uniform secondary treatment requirement for sewage treatment plants?")

MR. HOOKANO: That may be possible, your Honor. In the Hyperion situation where a uniform secondary treatment standard is being applied, the no-project alternative may include, for example, extension of the outfalls in the ocean. It may include examination of various disposal methods related to ocean disposal.

THE COURT: Then the final part of Question 3.

MR. HOOKANO: Again, the answer would be in the negative, because the uniform secondary treatment standards of effluent limitations could be established, but the manner of disposal could be determined—could be different at different locations.

THE COURT: Why don't you address yourself now to Question 6.

(Question No. 6 from the list entitled "Questions for Plaintiffs," which was [11] handed to the reporter, appears in the following words and figures, to wit:

"Even if the court were to accept plaintiffs' argument that the EPA has incorrectly sought to regulate the disposal of sludge from ocean outfalls under Section 301, when such regulation should proceed under Section 403, doesn't the Water Act, under Section 403, still give the EPA power to regulate the discharge of pollutants from ocean outfalls? And the EPA could, under Section 403, determine that sludge should not be disposed of in the ocean? So, if the EPA has the power under the Water Act to prohibit the disposal of sludge in the ocean, isn't a policy to that effect, even if arrived at under the incorrect section and through incorrect procedures, still a policy arrived at 'pursuant to' the Water Act, within the meaning of Section 511(c)(1)?")

MR. HOOKANO: The answer to the first part of Question 6 is, yes.

The answer to the second part of Question 6 is also, Yes.

The answer to the third part of Question 6 is we don't know what the origins of that policy are. We are not certain whether or not they come from the Water Act, and [12] therefore, within the provisions of Section 511(c).

I think that is a factual matter to be determined.

THE COURT: All right. Fine. I will hear from Mr. Garvin.

Why don't you address yourself to Question 6, as well, Mr. Garvin.

MR. GARVIN: Your Honor, regarding Question No. 1, the citation for the guidelines under Section—

THE COURT: Let's go to the one we just finished off, 6. These are plaintiffs' questions.

MR. GARVIN: Well, your Honor, the Act does give EPA the authority to regulate discharges of sludge or any pollutants from ocean outfalls.

THE COURT: You are referring now to Section 403?

MR. GARVIN: Yes.

THE COURT: All right.

MR. GARVIN: And, also, your Honor, to Section 301(a) of the Act, the principal section of the Act, which states that the discharge of a pollutant from any point source is illegal in the absence of compliance with various sections of the Act. That requires compliance with Section 301(b)(1)(b), which requires secondary treatment by publicly-owned treatment plants. And also to Section 402, which requires a permit to be issued, or that the discharger have a permit in order to continue discharge.

[13] Section 402 requires compliance with several sections of the Act. One of those is Section 403. And EPA could under Section 403 determine that sludge should not be disposed of in the ocean.

THE COURT: The last part of Question 6?

MR. GARVIN: Well, I suppose the answer is, Yes, your Honor. However, the definition of pollutant within Section, I think it is 502 of the Act, specifically includes sewage sludge as one of the pollutants which are regulated under the Act. So it is not really a generalized power or authority to regulate the discharge of sludge.

But the Act's definition of pollutant specifically indicates that the discharge of sludge is a pollutant which must be regulated.

THE COURT: That's 502?

MR. GARVIN: Excuse me. I will give you the exact section. 502(6). The term pollutant means dredge, spoils, solid waste, incinerator residue, sewage garbage, sewage sludge, et cetera.

THE COURT: Are you saying, then, that 502(6) is a source of the policy prohibiting disposal of sludge in the ocean?

MR. GARVIN: Not exactly, your Honor.

THE COURT: What is the source of the policy?

MR. GARVIN: The source of the policy is derived [14] from the secondary treatment requirements.

THE COURT: 301?

MR. GARVIN: 301(b)(1)(b).

Your Honor, it might be helpful in answering that question if I could go to your Question 2.

THE COURT: Well, do you want to answer 1, then? Start in on that.

MR. GARVIN: Okay.

(Question No. 1 from the list entitled "Questions for Government," which was handed to the reporter, appears in the following words and figures, to wit:

"What is the citation for the guidelines that the EPA is required to promulgate under Section 403?")

MR. GARVIN: The citation to the guidelines promulgated by EPA under Section 403 is 40 C.F.R. Part 227.

I am sorry I don't have the Federal Register citation at the moment.

THE COURT: You will get that and leave it with the clerk?

MR. GARVIN: Yes, your Honor.

THE COURT: All right.

(Question No. 2 from the list entitled "Questions for Government," which was [15] handed to the reporter, appears in the following words and figures, to wit: "When the EPA adopted its definition of secondary treatment in 1973, was it understood that the scope of the definition included a prohibition against disposal of sludge into the receiving waters of sewage treatment plants? If so, why wasn't the disposal of sludge dealt with in Hyperion's first NPDES permit? Isn't sludge usually considered a by-product of secondary treatment? If Congress intended to include sludge in Section 301, why did it enact section 405?")

MR. GARVIN: Under Question 2, EPA's definition of secondary treatment, or when EPA adopted its definition of secondary treatment, it was understood that the definition included the disposal of sludge. Sludge is nothing more than concentrated, suspended solids from the effluent stream of a discharge from a treatment plant.

Suspended solids can be any kind of organic matter. They can be cigarette butts or marbles, anything like that is considered to be a suspended solid.

When EPA promulgated—proposed and then promulgated its secondary treatment requirements, it established in those regulations limitations upon the amounts of suspended [16] solids that could be discharged.

Now, no definition or no distinction was made between suspended solids as they came to the sewage treatment plant in a dilute mass, or no distinction was made between suspended solids in that form and suspended solids after they have been taken out of the waste stream and concentrated into more compact matter, which we are referring to as sewage sludge.

When EPA issued those regulations I don't think it was contemplated that a municipality would seek to remove the total suspended solids in order to comply with the secondary treatment requirements, and then put them right back into the same—well, or into a different pipe into the same receiving waters.

Perhaps EPA should have thought of all possibilities, but that seemed—I imagine to those who established the regulations that seemed just a bit beyond what could be expected.

THE COURT: In other words, what you are saying is, what's the point in putting water that has gone through a secondary treatment process into the ocean, if you follow that up with the disposal of the sludge that was removed from the water?

MR. GARVIN: Exactly. The requirements establish a limitation on volume or amount of suspended solids that can [17] be discharged from the effluent stream; that the municipality must remove a certain volume of the total suspended solids.

It simply doesn't make sense to have a municipality meet the requirements for secondary treatment by removing these total suspended solids and then allow them to put it back in through a different pipe. That doesn't make any economic sense, or any environmental sense.

Now to your question why wasn't the disposal sludge dealt with in Hyperion's first NPDES permit.

To my understanding there are three outfall pipes from the Hyperion plant. One is labeled 001, and that is the one-mile outfall which is used in emergencies.

Then there is the five-mile outfall, which is 002, and that is the one used to discharge the effluent.

Then there is discharge No. 003, which is the seven-mile outfall.

When the permit was initially issued in 1974, no requirements were established for 003, that particular discharge. I think it was merely on oversight. I don't know, frankly, why that outfall was not covered.

However, I don't think—

THE COURT: It is kind of a big oversight.

MR. GARVIN: There are probably about 50,000 permits that are being issued throughout the country to various facilities, some of them more complex than this. If there [18] weren't some oversights I would be surprised. But exactly why it was left out in the initial permit I don't know.

The important point, though, is that it was included and effluent limitations were established for it in the amended permit, which was issued in August of 1975.

Now, before a permit is actually issued a draft permit is developed. The permittee is given a copy of it, notice of the permit's proposed issuance is published in the papers of general circulation, and the public and the permittee are given a 30-day period in which to comment before an informal public hearing is held. Then an informal public hearing is held, and EPA then issues the permit. And then after that EPA's regulations allow any interested party an opportunity to request an adjudicatory hearing to challenge the terms of the permit.

Although EPA may have been or was in error in not issuing it, effluent limitations for discharge 003 in 1974, if there was anything improper about them doing so in 1975, the public, and the City of Los Angeles, the permittee, had ample opportunity to contest the establishment of limitations for discharge 003. Yet no such challenge was ever made.

THE COURT: What about the next part of Question 2?

MR. GARVIN: Sludge is normally—well, is in essence a by-product of secondary treatment, because it is merely the concentration of the total suspended solids which [19] are in the effluent stream.

THE COURT: What about the last part of Question 2?

MR. GARVIN: Well, 405 covers the disposal of sewage sludge to navigable waters or the waters of the territorial sea, regardless of from what type or outfall or how it arrives in the sea.

It is important—one of these types of disposal that is covered by Section 405 is the dumping from barges.

Now, in this point—and this is really the primary purpose, I think, of Section 405, to cover discharge from vessels, because the Marine Protection and Sanctuaries Act of 1972 was adopted and passed the same year as the Federal Water Pollution Control Act, and that Act required a permit for any municipality or any person wishing to discharge any material, including sewage sludge, beyond the three-mile limit. However, it did not regulate dumping within the three-mile limit.

Section 405 should be viewed in that context as extending or in enacting a permit program for the discharge or disposal of sludge from vessels into areas within the three-mile limit, and not as a provision which totally—which is the only mechanism of regulating the discharge of sludge into the ocean.

You see, when the Marine Sanctuaries Act was adopted, that Act or bill was in a different committee or committees [20] than was the Federal Water Pollution Control Act. The jurisdiction of the committees were separate and distinct. The jurisdiction of the committees having control or debating the Marine Protection and Sanctuaries Act was beyond the three-mile limit, and the committee considering and adopting the Federal Water Pollution Control Act, their jurisdiction extended only within the three-mile limit. And this was a compromise worked out between them.

THE COURT: But a treatment plant on shore with an outfall beyond the three-mile limit, was that problem specifically addressed by either committee?

MR. GARVIN: Your Honor, I think it was. And I think we have citations to it in our brief. I may be wrong there. I have seen some discussion of that, though, in the legislative history discussing a compromise that was worked out.

The most important thing, now that I recall, is the definition of the term "dumping" under the Marine Sanctuaries and Protection Act specifically excludes the discharge of pollutants from ocean outfalls. So under the Marine Act—the Marine Act establishes procedures whereby anyone who wishes to dump must obtain a permit from EPA under the Act. So the definition of the term "dumping" specifically excluded the discharge of pollutants from ocean outfalls, meaning a pipe. And that is discussed in our memorandum in opposition to the motion for preliminary injunction. As [21] establishing a clear congressional intention that the discharge through ocean outfalls should be regulated under the Federal Water Pollution Control Act and not under the Marine Protection and Sanctuaries Act.

THE COURT: What about Question 3?

(Question No. 3 from the list entitled "Questions for Government," which was handed to the reporter, appears in the following words and figures, to wit: "Do you think Cingress intended that the EPA require a municipality to go ahead with a sewage treatment project when the EPA had not yet finished its EIS for the funding of the project? Doesn't that make the EIS an academic exercise?")

MR. GARVIN: When the Federal Water Pollution Control Act was adopted in December of 1972, it established a July 1, 1977 date for communities to meet the requirements of secondary treatment. So that was approximately four and a half years in the future from the time that the Act was adopted.

I think Congress anticipated that communities would, rather than challenging the basic requirements of the Act, would seek to implement them. And with that understanding I think they could justifiably have felt that the environmental impact statement process would have

gone on in an orderly [22] manner before the compliance date of July 1, '77 arrived.

However, in the case of Los Angeles the City has not taken rapid action to implement either the secondary treatment requirements or the sludge removal requirements of its permit, so here we are faced—this is May 23, 1977—and the Act establishes a July 1, 1977 compliance date.

I think if it appears inconsistent, I think it is just the crunch of time has fallen upon everyone, all of the actors in this drama, in that the Act establishes an absolute date for compliance.

The City is nowhere near ready to implement that compliance date. And if that means that enforcement must occur before the EIS is issued regarding funding, then that appears to be the result.

However, one thing should be stressed. That a municipality or any dischargers—well, any municipality's duty to comply with the Federal Water Pollution Control Act is independent of the decision of EPA whether or not to award grant funds.

I think the problem was discussed in depth by the district court in the Eastern District of Virginia in State Water Resources Board v. Train, which is 424 F.Supp. 146, that is in 1976, discussed the problem and pointed out that Congress had to be aware, when it adopted the Act and was aware that there weren't sufficient grant funds available for [23] all communities to meet the requirements of Section 301(b)(1)(b).

The court in State Water Resources Control Board v. Train held that communities' or municipalities' obligation to comply with those requirements were independent of the availability of federal funds.

The preparation of an EIS is merely to determine whether EPA should participate in the project; not whether the project should go forward. If the project is required in order to comply with the terms of the Act.

THE COURT: Anything else?

MR. GARVIN: Your Honor, I would just like to point out that the plaintiffs stated that they were not

challenging the terms of the permit. However, they then amended their response to say that they would be challenging the terms of the permit which require—or to the extent it requires an interim sludge project.

The permit or the effluent limitations in the permit include the compliance schedules established in the permit. This is clear from a specific reading of the definition of the term "effluent limitation" in Section 502(11) of the Act.

So when the plaintiffs state that they are challenging the requirement that an interim sludge project go forward, they are challenging a compliance schedule which is an effluent limitation of a permit. And that can only be challenged in the Court of Appeals.

[24] Thank you.

THE COURT: Does anyone else wish to be heard?

Anything further?

MR. BEST: Could we add a couple of comments, your Honor?

THE COURT: Sure, sure.

MR. BEST: I would like to point out that it is our understanding that there are no regulations in effect implementing the provisions in defendants' Question No. 1; that these were repealed recently with the adoption of the new ocean-dumping criteria. And I hope that that will be cleared up by the defendants in this case that as of now under Section 403 there are no guidelines in effect.

MR. GARVIN: Your Honor, the guidelines under Part 227 were repealed with respect to the ocean-dumping requirements under the Marine Sanctuary and Protection Act. However, the guidelines under Part 227 still apply, to my knowledge, to the compliance with Section 403.

The agency is in the process of developing revised guidelines specifically for Section 403.

THE COURT: Why don't you check that out and shoot me a note tomorrow on it?

MR. BEST: Our understanding is in the exact opposite.

I want to just mention a couple of points in what the [25] defendants have mentioned today.

First of all, I would like to point out that although they claim that 405 did not apply to the Hyperion plant, they have stated that a 405 permit has been issued for the sludge outfall of the Hyperion plant. So it would seem that EPA has in fact considered that 405 would be applicable in this instance.

Also, I believe that it is important to recognize that to the best of our knowledge the City is not in violation of the permits which have been issued. And that's a point that we want to urge by way of saying that the permits, the effluent limitations, and the requirements that have been placed on the outfalls are at present being met. And the statement that the City had a duty to comply with these requirements separate from grant funds and implementation of the project we think again reinforces the fact that an injunction against the project and the grant funds does not interfere with the enforcement or the standards, the uniform nationwide requirements that are put into the act.

I think maybe it should be recognized also that the permit we are dealing with here actually expired in January of this year and was extended by a summary action of the state board and the EPA only through June of this year, and the permit itself, I believe, is scheduled to expire in June.

[26] Is that incorrect?

MR. STIPANOVICH: Yes. The Regional Board this morning extended that, your Honor, to 1979.

MR. BEST: They have again extended without notice?

MR. STIPANOVICH: There was a full public hearing this morning.

MR. BEST: It has been extended until when?

MR. STIPANOVICH: I believe it is September 17, 1979.

MR. BEST: The last point. I think perhaps the federal defendants have cleared up some of the confusion by pointing out that it was perhaps never contemplated that

a situation such as Hyperion would arise under the Federal Water Pollution Control Act; that a circumstance would arise where it would make sense to put the sludge back in the water under separate conditions, because of the impacts that would result under the localized condition.

I think that recognized again that Section 301 and the requirements in the Act were not built around the inclusion of prohibitions against sludge.

THE COURT: What's the point of going through secondary treatment if the by-product of that treatment is then put into the ocean?

MR. BEST: There is some question as to whether there is any point going through secondary treatment, I will agree to that, your Honor. I think as to whether it makes any [27] sense to separate out the solids and put those in the ocean in a different place in a different manner than to leave them suspended in the effluent and put them all in the same place together, there are some good reasons for doing that; one of them being the resource recovery that occurs in that process, and another one being that the impacts on the water are considerably different. In other words, if you make these discharges in a different manner at a different location, at a different depth, and so forth, that it does modify and change the impact.

I think this is evidenced by the fact that Santa Monica Bay was considered to be contaminated when all of the products were dumped together out in the original outfall in the inshore waters. By separating them out and applying a different technology and putting the sludge out into the—

THE COURT: Is that what used to be the one-mile outfall?

MR. BEST: That is correct.

By separating these out into different locations and different manners of putting them in the water there was substantially less impact on the ocean.

So I think it can be established that it is not unreasonable to have a different method of doing it and to split

off the products and to discharge these products in another way.

[28] THE COURT: Does anyone else have anything to say?

(No response.)

THE COURT: The matter will stand submitted.
You will get that information?

MR. GARVIN: Yes, your Honor.

(Whereupon at 3:55 p.m. an adjournment was taken.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 77-0521-HP

PACIFIC LEGAL FOUNDATION, ET AL., PLAINTIFFS

vs.

JOHN R. QUARLES, JR., ET AL., DEFENDANTS

REPORTER'S CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court, Central District of California.

I further certify that the foregoing 28 pages comprise a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

/s/ [Illegible]
Official Reporter

Dated at Los Angeles, California, this 28th day of December, 1977.

ENVIRONMENTAL PROTECTION AGENCY
REGION IX
101 California Street
San Francisco CA 94111

In reply refer to:
E-4-1 869.2D

June 2, 1977

Mr. Warren A. Hollier, President
Board of Public Works
200 N. Spring Street, Room 353
Los Angeles, Ca. 90012

Dear Mr. Hollier:

In accordance with the Federal Water Pollution Control Act (33 U.S.C. 1251 et. seq.), the Environmental Protection Agency issued the following National Pollutant Discharge Elimination System (NPDES) permit to:

City of Los Angeles: Hyperion Treatment Plant
NPDES Permit No. CA0109991

A tentative determination has been formulated to extend the expiration date of the permit. This agency recently published a public notice of this tentative determination. After consideration of the expressed views of all interested persons and agencies, pertinent Federal statutes and regulations, and State action regarding certification of the discharge as affected by the determination, the Regional Administrator has made his final determination. This final determination does not constitute a significant change from the tentative determination set forth in the public notice.

The expiration date of this permit is hereby extended from June 30, 1977 to December 17, 1979.

For the Regional Administrator,

Original Signed By: Terry L. Stumph
For R. L. O'Connell
Director, Enforcement Division

cc: California RWQCB—Los Angeles, Central Coast
U.S. Fish and Wildlife Service, Laguna Niguel
Corps of Engineers, Los Angeles
11th Coast Guard District
National Marine Fisheries Service, Terminal Island, Ca.

bc: E-5-1
S-2-1

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD—LOS ANGELES REGION
South Broadway, Suite 4027
Los Angeles, California 90012
(213) 620-4460

June 2, 1977

City of Los Angeles
Bureau of Engineering
Room 800, City Hall
Los Angeles, California 90012

ATTENTION: Mr. Donald C. Tillman
City Engineer

RE: Waste Discharge Requirements (NPDES Permit No. CA0109991)—Hyperion Treatment Plant

Gentlemen:

Reference is made to our letter dated May 2, 1977, which transmitted a draft of a tentative Order extending the expiration date of the waste discharge requirements for the Hyperion Treatment Plant.

Pursuant to Division 7 of the Water Code of the State of California, this California Regional Water Quality Control Board, at a public hearing held on May 23, 1977, reviewed the tentative Order, considered all factors in the case, and adopted Order No. 77-84 (copy attached). This Order serves as a part of a permit under the National Pollutant Discharge Elimination System, and expires December 17, 1979. Please note that you must file an application for a new permit at least 180 days in advance of that date.

Your current Monitoring and Reporting Program remains in effect. Please reference all technical and monitoring reports to our Compliance File No. 1492.

Very truly yours,

Original signed by

Raymond M. Hertel
RAYMOND M. HERTEL
Executive Officer

cc: See attached mailing list

Enclosures

cc: Regional Board Members
Environmental Protection Agency, Region IX
Regional Administrator, ATTN: Enforcement Division & Permits Branch
United States Army Corps of Engineers
State Water Resources Control Board, Legal Division
ATTN: Mr. H. M. Schueller
Department of Fish and Game, Marine Resources Region
Department of Health, Water Sanitation Section
Department of Water Resources
Department of Parks and Recreation
Department of Navigation and Ocean Development
State Lands Division
City of Los Angeles, City Council
City of Los Angeles, City Engineer
City of Los Angeles, Bureau of Engineering
City of Los Angeles, Bureau of Sanitation
City of Los Angeles, Wastewater Systems Engineering Division
County of Los Angeles,
Department of Health Services
Los Angeles County Department of Parks and Recreation
Los Angeles County Engineer, Project Planning and Pollution Control Division

Los Angeles County Engineer, Sanitation Division
County Sanitation Districts of Los Angeles County
City of Santa Monica
City of El Segundo
City of Manhattan Beach
City of Hermosa Beach
City of Redondo Beach
City of Torrance
Malibu Township Council
U.S. Naval Station, Long Beach
Ocean Fish Protective Association
Izaak Walton League of America
NOAA, National Marine Fisheries Service
U.S. Fish and Wildlife Service
Division of River Basin Studies
11th District U.S. Coast Guard, Long Beach
Environmental Protection Agency, Region XI, Contact Office
U.S. Fish and Wildlife Service, ATTN: Regional Director
Mr. A. F. Peppermuller
Mr. Louis Fiske
Regional Wastewater Solids Management Program
Los Angeles-Orange County Metropolitan Area
California Regional Water Quality Control Board, Santa Ana Region
California Regional Water Quality Control Board, Central Coast Region
State Water Resources Control Board, Division of Water Quality ATTN: Mr. Dennis Anctil

State of California
Resource Agency

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,
LOS ANGELES REGION

Order No. 77-84

NPDES No. CA0109991

WASTE DISCHARGE REQUIREMENTS
FOR
CITY OF LOS ANGELES
HYPERION TREATMENT PLANT

The California Regional Water Quality Control Board, Los Angeles Region, finds:

1. City of Los Angeles discharges treated municipal wastewater and sewage sludge to Santa Monica Bay from its Hyperion Treatment Plant in Playa del Rey under requirements prescribed jointly on August 18, 1975, by this Board and the United States Environmental Protection Agency in Order No. 75-100 (NPDES Permit No. CA0109991). Order No. 75-100 has been amended by Order Nos. 75-65 and 77-1 adopted December 1, 1975, and January 24, 1977, respectively. Order No. 75-100 expires on June 30, 1977.

2. City of Los Angeles has filed a report of waste discharge and applied for renewal of its waste discharge requirements and National Pollutant Discharge Elimination System Permit prior to the expiration of the current requirements and Permit.

3. The Environmental Protection Agency is administratively modifying the expiration date of the NPDES Permit to extend the permit to the full five-year statutory length as provided in the Federal Water Pollution Control Act and has requested

that Order No. 75-100 be extended for the same period.

4. The City of Los Angeles has prepared a final environmental impact report in accordance with the California Environmental Quality Act (Public Resources Code Section 21000 et. seq.).

5. The City of Los Angeles has changed or altered the project as follows:

   a. Discharge of chlorinated secondary effluent out the 1-mile outfall during installation of the eductor-construction schedule has been arranged so that there should be no interruption of beach usage.

   b. Discharge of primary effluent during construction of secondary facilities—construction activities have been timed so that primary effluent will be discharged through the 5-miles outfall instead of the 1-mile outfall.

   c. Cessation of sludge discharge to ocean-landfills utilized will have a shortened useful life—however, no other alternative is currently available. The problem is being studied by the State Water Resources Control Board and the Los Angeles/Orange Metropolitan Area Study Group.

6. The changes or alternatives in the project mitigate or avoid the significant or lasting adverse environmental impacts of the project.

The Board has notified the discharger and interested agencies and persons of its intent to amend waste discharge requirements for this discharge and has provided them with an opportunity to submit their written views and recommendations.

The Board in a public hearing heard and considered all comments pertaining to the tentative Order.

This Order shall serve as part of a National Pollutant Discharge Elimination System permit pursuant to Section 402 of the Federal Water Pollution Control Act, or

amendments thereto, and shall take effect at the end of ten days from the date of its adoption, provided the Regional Administrator, EPA, has no objections.

IT IS HEREBY ORDERED, that Order No. 75-100 adopted by this Board on August 18, 1975, shall be revised as follows:

1. The expiration date in Provision F-5 is changed from June 30, 1977, to December 17, 1979.
2. All other limitations, prohibitions, requirements, and provisions of Order No. 75-100 shall remain in full force and effect.
3. Order No. 77-1 adopted on January 24, 1977, is hereby rescinded.

I, Raymond M. Hertel, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on May 23, 1977.

/s/ Raymond M. Hertel
RAYMOND M. HERTEL,
Executive Officer

June 10, 1977

Mr. William H. Pierce, Chief
Permits Branch Enforcement Division
United States Environmental
Protection Agency
100 California Street
San Francisco, CA 94111

Dear Mr. Pierce:

In re: Hyperion Treatment Plant, Los Angeles, California, Interim Sludge Processing and Disposal System Extension of Expiration Date for NPDES Permit No. CA0109991, Reference: E-4-1 869.2D

This is a request pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552.

We have attempted through telephone conversations with Environmental Protection Agency Region IX offices to find out whether the extension has been approved and, if so, on what date. Thus far, we have not been given a response.

In accord with the provisions of the Freedom of Information Act, please furnish us with the following:

1. The date of issuance of the Environmental Protection Agency extension of the expiration date to December 17, 1979, of NPDES Permit No. CA0109991.
2. The official document of the Environmental Protection Agency which establishes the extended expiration date of the permit.
3. All supporting documents and materials which form the basis for the decision to extend the expiration date of NPDES Permit No. CA0109991 from June 30, 1977, to December 17, 1979.

Pacific Legal Foundation is a nonprofit, tax-exempt law firm serving the public interest. We therefore request that in accordance with the provisions of the Freedom of

Information Act any fees be waived, as the information is requested primarily to benefit the public.

Very truly yours,

/s/ David M. Shell
DAVID M. SHELL
Law Clerk

DMS:bg

[Receipt Omitted in Printing]

June 13, 1977

PMS PAUL DEFALCO JR REGIONAL DIRECTOR
REGION IX UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, RDM REPORT DELIVERY
BY MAILGRAM, DLR
100 CALIFORNIA ST
SAN FRANCISCO CA 94111

REQUEST FOR AN ADJUDICATORY HEARING
PURSUANT TO 40 CFR SECTION 125.36

1. NAME AND ADDRESS OF REQUESTOR

JOHN B KILROY SR
870 STRADA VECCHIA
LOS ANGELES CA 90024

2. INTERESTS OF REQUESTOR

MR KILROY AS A RESIDENT OF LOS ANGELES IS DIRECTLY AFFECTED BY ANY PROPOSAL SIGNIFICANTLY AFFECTING THE OPERATION OF THE HYPERION TREATMENT PLANT AND THE ENVIRONMENT OF THE LOS ANGELES AREA

3. PARTICIPATION BY REQUESTOR

REQUESTOR AGREES TO COMPLY WITH THE TERMS OF 40 CFR SECTION 125.36(B)(2)(IV)

4. REASONS FOR THE REQUEST

REQUESTOR ASKS THAT THE DECISION OF EPA TO EXTEND THE EXPIRATION OF NPDES PERMIT CA010991 BE SET ASIDE FOR THE FOLLOWING REASONS:

1. THE 30 DAY NOTICE PRIOR TO HEARING (SECTION 125.32(A)) AND THE 30 DAY PERIOD FOR PUBLIC INPUT MANDATED BY 40 CFR SECTION 125.32(B)(1) WERE NOT COMPLIED

WITH THEREFORE DENYING REQUESTOR AN OPPORTUNITY TO BE HEARD.

2. THE PROCEDURES FOR ISSUANCE OF AN NPDES PERMIT PURSUANT TO 40 CFR SECTION 125.2 ET SEQ. WERE NOT FOLLOWED, THERE ARE NO PROVISIONS IN THE REGULATIONS FOR THE EXTENSION OF THE EXPIRATION OF AN NPDES PERMIT.

5. ISSUES TO BE RAISED

REQUESTOR WOULD RAISE THE FOLLOWING ISSUES:

1. WHETHER THE REQUIREMENTS OF THE PERMIT SHOULD BE MODIFIED IN THAT THE PROJECT THAT IS THE SUBJECT OF THE COMPLIANCE SCHEDULE SET FORTH IN NPDES PERMIT CA010991 IS BEING EVALUATED IN AN EIS BY THE EPA PURSUANT TO THE REQUIREMENTS OF NEPA, THE COMPLIANCE SCHEDULE SHOULD NOT BE MANDATED IN AN NPDES PERMIT UNTIL THE NEPA STUDY IS COMPLETED; AND

2. WHETHER THE PROCEDURES USED AND THE RECORD DEVELOPED WERE ADEQUATE ISSUANCE OF AN NPDES PERMIT.

REQUESTOR WOULD PROPOSE TO SET ASIDE THE ACTION TAKEN TO EXTEND THE EXPIRATION DATE OF NPDES PERMIT CA0109991 AND PROVIDE FOR FULL ADMINISTRATIVE PROCEDURES REQUIRED FOR THE ISSUANCE OF AN NPDES PERMIT.

DONALD M PACH ATTORNEY FOR JOHN B KILROY SR. PACIFIC LEGAL FOUNDATION 455 CAPITOL MALL SUITE 465 SACRAMENTO CA 95814

MIDDLETOWN, VA. 22645

[SEAL] [SEAL]

WESTERN UNION MAILGRAM

2-068863E164002 06/13/77 ICS IPMRNCZ CSP SACB
1 9164440154 MGM TDRN SACRAMENTO CA 06-13
0804P EST

PACIFIC LEGAL FOUNDATION BG
455 CAPITOL MALL SUITE 465
SACRAMENTO CA 95814

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

9164440154 NL TDRN SACRAMENTO CA 11 06-13 0804P EST PMS PAUL DEFALCO JR REGIONAL DIRECTOR REGION IX UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RDM REPORT DELIVERY BY MAILGRAM, DLR
100 CALIFORNIA ST
SAN FRANCISCO CA 94111

REQUEST FOR AN ADJUDICATORY HEARING PURSUANT TO 40 CFR SECTION 125.36

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REQUESTOR AGREES TO COMPLY WITH THE TERMS OF 40 CFR SECTION 125.36(B)(2)(IV)

4. REASONS FOR THE REQUEST

REQUESTOR ASKS THAT THE DECISION OF EPA TO EXTEND THE EXPIRATION OF NPDES PERMIT CA0109991 BE SET ASIDE FOR THE FOLLOWING REASONS:

1. THE 30 DAY NOTICE PRIOR TO HEARING (SECTION 125.32(A)) AND THE 30 DAY PERIOD FOR PUBLIC INPUT MANDATED BY 40 CFR SECTION 125.32(B)(1) WERE NOT COMPLIED WITH THEREFORE DENYING REQUESTOR AN OPPORTUNITY TO BE HEARD.
2. THE PROCEDURES FOR ISSUANCE OF AN NPDES PERMIT PURSUANT TO 40 CFR SECTION 125.2 ET SEQ. WERE NOT FOLLOWED. THERE ARE NO PROVISIONS IN THE REGULATIONS FOR THE EXTENSION OF THE EXPIRATION OF AN NPDES PERMIT.

5. ISSUES TO BE RAISED

REQUESTOR WOULD RAISE THE FOLLOWING ISSUES:

1. WHETHER THE REQUIREMENTS OF THE PERMIT SHOULD BE MODIFIED IN THAT THE PROJECT THAT IS THE SUBJECT OF THE COMPLIANCE SCHEDULE SET FORTH IN NPDES PERMIT CA0109991 IS BEING EVALUATED IN AN EIS BY EPA PURSUANT TO THE REQUIREMENTS OF NEPA, THE COMPLIANCE SCHEDULE SHOULD NOT BE MANDATED IN AN NPDES PERMIT UNTIL THE NEPA STUDY IS COMPLETED; AND

2. WHETHER THE PROCEDURES USED AND THE RECORD DEVELOPED WERE ADEQUATE ISSUANCE OF AN NPDES PERMIT.

REQUESTOR WOULD PROPOSE TO SET ASIDE THE ACTION TAKEN TO EXTEND THE EXPRIATION DATE OF NPDES PERMIT CA0109991 AND PROVIDE FOR FULL ADMINISTRATIVE PROCEDURES

REQUIRED FOR THE ISSUANCE OF AN NPDES PERMIT.

DONALD M PATCH ATTORNEY FOR JOHN B KILROY SR, PACIFIC LEGAL FOUNDATION 455 CAPITOL MALL SUITE 465 SACRAMENTO CA 95814

20:04 EST

MGMCOMP MGM

CERTIFICATE OF SERVICE BY MAIL

I, Barbara Gordon, certify as follows:

I am a citizen of the United States, residing or employed in Sacramento, California;

My business address is 455 Capitol Mall, Suite 465, Sacramento, California 95814;

I am over the age of eighteen years, and am not a party to the above entitled action;

On February 10, 1978, two true copies of PETITIONERS' REPLY BRIEF were placed in envelopes addressed to:

JAMES W. MOORMAN
Assistant Attorney General
ANGUS MACBETH
Chief, Pollution Control Section
RAYMOND W. MUSHAL
Attorney, Pollution Control Section
U.S. Department of Justice
Washington, DC 20530

JOAN Z. BERNSTEIN
General Counsel
LISA K. FRIEDMAN
Attorney
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

ANTHONY O. GARVIN
Acting Regional Counsel, Region IX
U.S. Environmental Protection Agency
215 Fremont Street
San Francisco, CA 94105

STANLEY E. REMELMEYER
City Attorney
City of Torrance
3031 Torrance Boulevard
Torrance, CA 90503

BURT PINES, City Attorney
THOMAS C. BONAVENTURA
Assistant City Attorney, Civil Division
MICHAEL E. WALDORF
FREDERICK MERKIN
Deputy City Attorneys
City of Los Angeles
1700 City Hall East
200 North Main
Los Angeles, CA 90012

RICHARD TERZIAN, Esq.
Burke, Williams & Sorensen
707 Wilshire Boulevard
Los Angeles, CA 90012

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

Executed on February 10, 1978, at Sacramento, California.

/s/ Barbara Gordon
BARBARA GORDON

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
100 California Street
San Francisco, California 94111

In Reply
Refer to:

HEA-1 E-2

CERTIFIED MAIL NO. 474683
RETURN RECEIPT REQUESTED

June 23, 1977

Donald M. Pach, Esq.
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, CA 95814

Subject: NPDES Permit No. CA0109991—
City of Los Angeles

Dear Mr. Pach:

We are in receipt of your telegram dated June 13, 1977, requesting an adjudicatory hearing on the above subject permit on behalf of John B. Kilroy, Sr.

I have determined that the request does not set forth material issues of fact relevant to the question of whether a permit should be issued or modified, and that the request does not meet the requirements of 40 CFR 125.36 (c) (1) (ii). I therefore deny the request, and my final determination remains in effect. The request does, however, present issues of law relating to interpretations of regulations promulgated under the Federal Water Pollution Control Act which should be referred to the General Counsel for decision pursuant to 40 CFR 125.36 (m) (3). Therefore, I am certifying to the General

Counsel for decision the issues of law raised by your request. A copy of my certification is enclosed.

Sincerely,

Original signed by

R. L. O'Connell
for Paul De Falco, Jr.
Regional Administrator

Enclosure

cc: City of Los Angeles (w/enc.)

bc: State Water Resources Control Board (w/enc.)
Los Angeles Regional Water Quality
Control Board (w/enc.)
Barry S. Shanoff (EN-338) (w/enc.)
Regional Counsel (w/enc.)
E-4 (w/enc.)
E-5 (w/enc.)

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

Docket No. IX-WP-77-4

IN THE MATTER OF:

National Pollutant Discharge
Elimination System (NPDES)
Permit No. CA0109991 Issued
to CITY OF LOS ANGELES

CERTIFICATION OF ISSUES OF LAW

A request for an adjudicatory hearing, dated June 13, 1977, was received from Donald M. Pach, on behalf of John B. Kilroy, Sr., that raises the following issues of law which require a decision of the General Counsel pursuant to 40 CFR 125.36(m)(3):

1. Must EPA conduct an informal public hearing prior to taking action to extend the expiration date of an NPDES permit where public notice of the proposed action was published more than 30 days in advance of the action?
2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date?
3. May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project?

Pursuant to 40 CFR 125.36(m)(2), each party may file a brief with the General Counsel within twenty (20) days of the date of this certification. The briefs shall contain:

(1) A subject index of the issues presented in the brief, with page references, and a table of statutes, cases, textbooks, and other material cited, with page references;
(2) A concise statement of each referred issue;
(3) A discussion of each issue, including arguments in favor of the referring party's position and citations to cases, statutes, legislative history, etc., tending to support such positions; and
(4) A recommended decision for each referred issue.

Forwarded herewith is a copy of the record of procedures and action taken in the modification of the subject permit by extending the termination date.

Dated: Jun. 23, 1977

/s/ R. L. O'Connell
for PAUL DEFALCO, JR.
Regional Administrator

I hereby certify that a copy of the foregoing Certification of Issues of Law, addressed to the following, was mailed, Certified Mail, Return Receipt Requested, postage prepaid, in a United States Postal mail box; sent by Pouch Mail of the U.S. Postal Service, or hand-delivered, at San Francisco, California, on the 23rd day of June 1977:

G. William Frick
General Counsel (A-130)
U.S. Environmental Protection Agency
Room W513
401 M Street, S.W.
Washington, D.C. 20460

Donald M. Pach, Esq.
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, CA 95814

Certified Mail
No. 474683

Matthew S. Walker
Senior Attorney
Enforcement Division
U.S. Environmental Protection Agency
100 California Street
San Francisco, CA 94111

Dated at San Francisco, California, this 23rd day of June 1977.

/s/ Lorraine Pearson
LORRAINE PEARSON
Regional Hearing Clerk
Region IX

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION IX
100 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111

In Ref To
RIN 77F-50

June 23 1977

Mr. David M. Shell
Pacific Legal Foundation
455 Capitol Mall
Suite 465
Sacramento, CA 95814

Re: Extension of Expiration Date for NDPES Permit for Hyperion Treatment Plant

Dear Mr. Shell:

This letter is in response to your Freedom of Information Act request dated June 10, 1977, to Mr. William Pierce in which you requested copies of documents supporting the extension of the expiration date of the NPDES permit issued to the City of Los Angeles for the Hyperion Treatment Plant. Pursuant to your request, please find enclosed the following documents:

1. Determination of Regional Administrator extending the expiration date of the NPDES Permit No. CA0109991 addressed to Mr. Warren A. Hollier dated June 2, 1977.
2. Undated letter to City of Los Angeles from Raymond M. Hertel.
3. Letter dated July 29, 1976, to Donald Tillman from Stanley Leibowitz.
4. Letter dated August 6, 1976, to Stanley Leibowitz from Donald C. Tillman with attachments.
5. National Pollutant Discharge Elimination System Application for Permit to Discharge Wastewater submitted by the City of Los Angeles dated July 30, 1976.

6. Letter dated September 27, 1976, to Regional Administrator of EPA from Raymond M. Hertel.

7. Joint Order dated January 24, 1977, extending expiration date of NPDES permit and Regional Board permit signed by Raymond M. Hertel and William H. Pierce.

8. Letter dated January 27, 1977, to City of Los Angeles from Raymond M. Hertel.

9. Letter dated April 26, 1977, to Warren A. Hollier from William H. Pierce.

10. Notice of Proposed Action by EPA on modification of the NPDES permit for the Hyperion Treatment Plant dated April 27, 1977.

11. Public voucher for advertising dated May 3, 1977, and advertising order dated April 26, 1977, for publication of public notice in *Los Angeles Times.*

12. Letter dated May 2, 1977, to City of Los Angeles from Raymond M. Hertel with tentative Order attached.

13. Letter dated May 20, 1977, to William H. Pierce from James J. Slawson, U.S. Department of Commerce, National Oceanic and Atmospheric Administration.

14. Letter dated May 26, 1977 to Regional Administrator, EPA from James J. McKevitt, U.S. Department of Interior Fish and Wildlife Service.

15. Letter dated June 2, 1977, to City of Los Angeles from Raymond M. Hertel with Order No. 77-84 attached.

These documents represent all of the materials received by EPA prior to the extension of the expiration date of the NPDES permit for the Hyperion Treatment Plant. The cost of duplication for these documents is being waived in view of the fact that the Pacific Legal Foundation is a public interest law firm.

Sincerely,

David R. Andrews
Regional Counsel

By /s/ Anythony O. Garvin
ANTHONY O. GARVIN
Assistant Regional Counsel

Enclosures
cc: William H. Pierce

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Docket No. IX-WP-77-4

IN THE MATTER OF
National Pollutant Discharge
Elimination System (NPDES)
Permit No. CA0109991 Issued
To City of Los Angeles

BRIEF OF PACIFIC LEGAL FOUNDATION ON BEHALF OF JOHN B. KILROY ON CERTIFIED QUESTIONS TO GENERAL COUNSEL

[Table of Contents and Authorities Omitted]

INTRODUCTION

The issues of law certified to the General Counsel by the Environmental Protection Agency (EPA) Regional Administrator of Region IX are not an accurate reflection of the issues which would have been raised at the adjudicatory hearing requested pursuant to 40 C.F.R. § 125.36. Requestor of the adjudicatory hearing, John B. Kilroy, proposed to raise two basic issues:

1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and

2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water

Pollution Control Act (FWPCA, 33 U.S.C. §§ 1281, *et seq.* (See AttachmentA.)

ISSUES PRESENTED

John B. Kilroy (hereinafter requestor) will address, in part, issues two and three certified to the General Counsel. Issue two is as follows:

> "2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date"

In issue two, the Regional Administrator makes two assumptions: (1) that the extension of the expiration date of an NPDES permit is authorized, and (2) that it could be construed as a modification. Requestor denies the validity of both assumptions and will present his arguments in I and II below.

Issue three certified to the General Counsel is as follows:

> "3. May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project?"

For clarity, requestor will divide his discussion of issue three into two parts. First, may the expiration date of an NPDES permit be extended (*i.e.*, without issuing a new permit) and second, should a project which is the subject of an EIS be mandated in a compliance schedule of an NPDES permit which is being newly issued where such schedule would require implementation prior to completion of the NEPA-EIS process? These issues will be addressed in arguments III and IV below.

ARGUMENT

I

EPA HAS NO AUTHORITY TO EXTEND THE EXPIRATION DATE OF AN NPDES PERMIT

Pursuant to 33 U.S.C. § 1342(a)(2), "the [NPDES] permit program of the Administrator . . . shall be subject to the same terms, conditions, and requirements as . . . permits issued . . . under subsection (b) . . . ." Subsection (b) is entitled "State permit programs." The Regional Administrator is subject to the requirements set out in subsection (b) and the regulations adopted pursuant to the applicable statutes.

Title 33, United States Code, § 1342(b)(1)(B) provides that NPDES permits are to be for *fixed* terms not exceeding five years. The regulations adopted pursuant to this authority, as set out in 40 C.F.R. §§ 124.51 [1] and 125.25(c) [2], make it clear that it is the intent of EPA to issue an NPDES permit for a fixed term. The use of "term" in this context is separate and distinct from the use of the word "terms" found in other parts of the applicable statutes and regulations. As used to described the duration of an NPDES permit, "fixed term" is clear and unambiguous. The date of issuance will fix the beginning date and the ending date will fix the expiration date. Upon the expiration of the fixed term, set forth in the permit pursuant to the mandates of 33 U.S.C. § 1342 (b) and 40 C.F.R. §§ 124.51 and 125.25(c), the permit will no longer be in force. To continue to discharge after the expiration date of the fixed term, the permittee must apply for issuance of a new permit.[3]

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[1] 40 C.F.R. § 124.51. "Duration of issued NPDES permits." "Any State or interstate agency participating in the NPDES shall provide that each issued NPDES permit shall have a fixed term not to exceed 5 years."

[2] 40 C.F.R. § 125.25(c). "Duration of permits." "(c) All permits will be for a fixed term."

[3] *See* Attachment B hereto, correspondence from Stanley Leibowitz, Chief, General Services Section, EPA, to Donald Tillman, Los

EPA is bound by both the applicable statutes and regulations. Both the statutes and regulations mandate that an NPDES permit be for a fixed term, which by definition precludes EPA from extending the expiration date of an existing permit. An example would be appropriate to illustrate the abuses which could result if EPA were allowed merely to extend the expiration date of a permit. Suppose that an NPDES permit were issued for a 90 day fixed term. The public would not be too alarmed at such a short duration, and there would probably be no challenge to the pollutants being discharged. If at the end of the 90 day period, EPA extended the expiration date for four years and nine months, which period would not exceed the maximum duration of a permit, then the public could only contest the extension of the permit and not the limitations, restrictions, conditions, and other terms in the permit.[4] It was not the intent of Congress to allow for this type of absurb situation to arise, and yet, if the Regional Administrator's interpretation of his action is allowed to stand it is possible for it to occur. It is recommended that the General Counsel issue a decision that EPA is without authority to extend the expiration date of an existing NPDES permit because of the clear and unambiguous language of the applicable statutes and regulations and the possibility for excessive abuses on the part of EPA.

II

THE ACTION TAKEN BY THE REGIONAL ADMINISTRATOR CANNOT BE CONSTRUED AS A MODIFICATION TO AN ISSUED NPDES PERMIT

In question two[5] certified to the General Counsel, the position taken by the Regional Administrator is that the

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Angeles City Engineer, regarding the expiration of Permit No. CA0109991 and the necessity to obtain a new permit and Donald Tillman's response to that communication.

[4] 40 C.F.R. § 125.36, Adjudicatory Hearings.

[5] "Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extention of the permit's expiration date?"

extension of the expiration date of an NPDES permit is a modification of the permit. Incorporating Argument I above, it is contended that the extension of an expiration date cannot be a modification within the framework of the applicable statutes or regulations.

The statutes[6] are definite as to what modifications may be made to an issued NPDES permit. Subpart C (40 C.F.R. §§ 125.21-125.28) of the regulations adopted by EPA sets forth the terms and conditions of an NPDES permit. The regulations allow for modification of effluent limitations (40 C.F.R. § 125.28), treatment standards (40 C.F.R. § 125.28(a)(2)), and schedules of compliance (40 C.F.R. § 125.23(d)), which are the terms and conditions upon which an NPDES permit will be issued for a fixed term. It would be anomalous indeed for the expiration date of a permit to be modifiable in the face of the statutes and regulations which provide for issuance of a new permit upon expiration and the statutes and regulations which set out the specific terms and conditions of a permit which are modifiable. The expiration date is conspicuously omitted as a modifiable term.

It is urged that the General Counsel determine that the expiration date of an NPDES permit is not subject to modification. By definition the expiration date must be fixed and is thus not modifiable. Upon expiration, issu-

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[6] Title 33, United States Code, § 1311(c) provides:

"(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

Title 33, United States Code, § 1342(b)(1)(C)(iii) provides that a permit can be terminated or modified for:

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge."

See also 33 U.S.C. §§ 1342(b)(1)(C)(i), 1342(b)(1)(C)(ii).

ance of a new permit is the statutorily and regulatory prescribed method of action.

III

THE ACTION TAKEN BY THE REGIONAL ADMINISTRATOR WAS THE ISSUANCE OF AN NPDES PERMIT

Incorporating the above arguments, the action taken by the Regional Administrator regarding NPDES Permit No. CA0109991 was the issuance of a new NPDES permit. This conclusion is supported by the provisions of 40 C.F.R. § 125.2(a)(1). The regulations in 40 C.F.R. § 125 "do not prescribe policy or procedures for the issuance of permits by States under programs approved by the Administrator. . . ." (40 C.F.R. § 125.2(b).) NPDES Permit No. CA0109991 was issued by EPA and it appears that the position taken by EPA is that 40 C.F.R. § 125 would apply. (*See* Attachment B.)

It is recommended that the General Counsel determine that the action taken by the Regional Administrator was to issue a new NPDES permit for discharges of pollutants from the Hyperion Treatment Plant previously permitted under NPDES Permit No. CA0109991 which expired on February 1, 1977. As such, the Administrator failed to comply with applicable regulations and erroneously denied John B. Kilroy's petition for an adjudicatory hearing.

IV

A PERMITTEE SHOULD NOT BE FORCED TO IMPLEMENT A PROJECT CONTAINED IN A COMPLIANCE SCHEDULE WHEN THAT PROJECT IS BEING STUDIED IN AN EIS

NPDES Permit No. CA0109991, issued to the City of Los Angeles for the Hyperion Treatment Plant, includes in the schedule of compliance an interim sludge management project which is to be evaluated in an EIS being prepared by EPA in compliance with the requirements of NEPA and FWPCA. (*See* Attachment C at 3-4.) If

EPA continues to mandate the interim sludge management project and the EIS prepared for the project indicates another preferred, more environmentally sound alternative, an irreversible commitment of resources may occur and the NEPA process rendered purely academic, contrary to the intent and policies of NEPA.

On June 3, 1977, the State Water Resources Control Board of California determined that the Secondary Treatment Standards set pursuant to Pub. L. No. 92-500 would require large expenditures for no measurable water quality benefit. (*See* Attachment D at 2.) The interim slude management project for the Hyperion Treatment Plant is primarily based on requirements set pursuant to EPA's interpretation of 33 U.S.C. § 1311(b)(1)(B). If the primary basis for a project is determined in an EIS to be environmentally unsound, the project's adverse environmental impacts should be mitigated, where feasible. In the instant case, evidence has been presented which casts doubt on the propriety of going forward with this project. Moreover, implementation of the project prior to completion of the NEPA process forecloses any opportunity to expeditiously mitigate any negative environmental consequences. It is incumbent upon EPA to avoid taking action which could cause an irreversible and irretrievable loss of resources.

There is the absence of any compelling need to implement the interim sludge management project prior to completion of the NEPA process. In *Flint Ridge* v. *Scenic Rivers Association*, —— U.S. ——, 8 E.R.C. 2137 (1976), the Supreme Court held that where statutory limitations preclude preparation of an EIS, then the absence of an EIS will not bar an agency action. In the instant case there is no statutory or regulatory time limit on implementation of the project. NEPA requires that all federal agencies comply "to the fullest extent possible" with the directives of 42 U.S.C. § 4332. Here, EPA has not complied with the dictates of NEPA. An interim project is being mandated which could cause an irreversible and irretrievable commitment of resources when there is no statutory time limit to preclude the prior prepara-

tion of an EIS and full evaluation of each alternative, including no project.

Requestor recommends that General Counsel determine that a project which is being studied in an EIS should not be mandated until the EIS has been completed and comments received.

CONCLUSION

There is no statutory authority for the Regional Administrator to extend the expiration date of an NPDES permit, or to treat the extension of the expiration date as a modification. The statutes and regulations unambiguously provide for issuance of a permit for a fixed term, and upon expiration of the term for the issuance of a new permit.

The Regional Administrator has not complied to the fullest extent possible with the dictates of NEPA. The potential irreparable and irreversible commitment of resources mandated by the implementation of the interim slude project prior to completion of an EIS defies both logic and the law. It is recommended that the General Counsel adopt this position and provide guidance for future disputes which may arise under FWPCA.

DATED: July 12, 1977.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
THOMAS E. HOOKANO

By /s/ Thomas E. Hookano
THOMAS E. HOOKANO

Attorneys for Requestor

Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154

[Attachments Omitted]

ROBERT L. BROSIO
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division
BARRY J. TRILLING
Assistant U.S. Attorney
1100 U.S. Court House
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-2450

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed Aug 12, 1977

No. CV 77 3047 R

UNITED STATES OF AMERICA, PLAINTIFF

v.

CITY OF LOS ANGELES, DEFENDANT

COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

[33 U.S.C. §§ 1311, 1319 and 1342]

The United States of America, by its undersigned attorney, by authority of the Attorney General, and at the request of the Administrator of the Environmental Protection Agency, alleges that:

I

This is a civil action instituted pursuant to Sections 309(a), (b), and (d) of the Federal Water Pollution Control Act Amendments of 1972, (hereinafter "the Act") [33 U.S.C. §§ 1319(a), (b) and (d)] to enjoin

the City of Los Angeles (hereinafter Defendant) from violating certain conditions of a permit issued to defendant under Section 402 of the Act [33 U.S.C. § 1342], and from violating Section 309(a) of the Act [33 U.S.C. § 1311], and to impose civil penalties against defendant for violations of said permit as provided in Section 309(d) of the Act [33 U.S.C. § 1319(d)].

II

This court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. § 1345 and 33 U.S.C. § 1319(b).

III

The defendant is an incorporated city of the State of California and is located in the County of Los Angeles in the Central District of California.

IV

At all times herein mentioned, the defendant has owned and operated the Hyperion Treatment Plant located at 12000 Vista Del Mar Boulevard, Playa Del Rey, California.

V

The Hyperion Treatment Plant discharges sewage sludge by means of an outfall sewer, known as discharge serial number 003, which extends approximately six and seven-tenths (6.7) miles into the Pacific Ocean at Santa Monica Bay, which is in the contiguous zone. This discharge is approximately 4.24 million gallons per day (4.24 MGD) and consists of digested sludge diluted with secondary effluent. The discharge contains arsenic, cadmium, chronium, copper, cyanide, lead, mercury, nickel, silver, zinc, phenols, and chlorinated hydrocarbons as well as other chemical and organic substances.

VI

The Hyperion Treatment Plant discharges treated wastewater by means of an outfall sewer, known as discharge serial number 002, which extends approximately

five and two-hundreths (5.02) miles into the Pacfic Ocean at Santa Monica Bay, which is in the contiguous zone. This discharge is approximately 360 million gallons per day (360 MGD) and consists of approximately 100 million gallons (100 MGD) of wastewater which currently receives secondary treatment with the balance (260 MGD) receiving only primary treatment.

VII

On August 18, 1975, pursuant to Section 402 of the Act and the regulations promulgated thereunder, the defendant was issued a National Pollutant Discharge Elimination System Permit (hereinafter permit) for the discharge of sewage sludge from discharge serial number 003, and for the discharge of wastewater from discharge serial number 002. The permit, Number CA 0109991, was issued by the Environmental Protection Agency (hereinafter EPA) with an effective date of September 18, 1975. A copy of the permit is attached and marked Exhibit I and is hereby incorporated herein. The city did not appeal or object to the permit conditions at the time of issuance, nor did it file any timely administrative appeal.

FIRST CLAIM

VIII

The permit provides for the termination of the discharge of sewage sludge from discharge serial number 003 thirty (30) months from the date of concept approval. The permit provides that this termination is to be accomplished in three (3) phases: (1) the elimination of no less than 1/3 of the sewage sludge presently discharged; (2) the elimination of no less than an additional 1/3 of the sewage sludge presently discharged; and (3) the termination of the discharge of the final portion of sewage sludge.

IX

In order to accomplish the termination of discharge of sludge as described in Paragraph VIII above, the permit

prescribes several interim actions. The defendant was required to provide complete approvable plans and specifications for phases 1, 2, and 3 described in Paragraph VIII not later than six (6) months from the date of concept approval.

X

Concept approval was given on October 1, 1975 by letter to Donald E. Tillman, City Engineer from Larry F. Walker of the State Water Resources Control Board (hereinafter Board), a copy of which is attached and marked Exhibit 2 and is hereby incorporated herein. The termination of the sewage sludge discharge is due to occur on or before April 1, 1978. The required approvable plans and specifications referred to in Paragraph IX were to be completed on or before April 1, 1976.

XI

Defendant has failed to meet the requirements described in Paragraphs IX and X.

XII

The permit required the defendant to submit a report of compliance fifteen (15) days after the date specified for completion of a required task. Thus, a report of compliance with the requirement referred to in Paragraphs IX and X was due on or before April 16, 1976.

XIII

The defendant has failed to meet the requirement described in Paragraph XII.

XIV

The permit required the defendant to award contracts and begin construction for the facilities set forth in the approvable plans and specifications not later than nine (9) months from the date of concept approval. Thus, construction was to begin on or before July 1, 1976.

XV

The defendant has failed to meet either of the requirements set forth in Paragraph XIV.

XVI

In addition, defendant has been aware since 1971 that sewage sludge discharge had to be eliminated. Grants of Federal and State funds amounting to $20 million have been accepted by the defendant, conditioned upon the total elimination of sludge discharges from the Hyperion works. Such grants required cessation of the discharge by December 1, 1976. The City sought, and obtained, an extension of the deadline until 1978 in a discharge permit issued to it by the Environmental Protection Agency. Thereafter, on April 23, 1976, defendant's City Council adopted a report of the Council's Public Works Committee which stated that "it is not practicable for the City to bind itself to a specific timetable for the termination of the discharge of the sewage sludge."

SECOND CLAIM

XVII

The permit provides for the upgrading of the Hyperion Treatment Plant so that all wastewater discharged through discharge serial number 002 receives secondary treatment by October 1, 1979.

XVIII

In order to accomplish the upgrading of the wastewater discharge described in Paragraph XVII the permit prescribes several interim actions that the defendant shall perform in order to meet the October 1, 1979 deadline. These interim actions are as follows:

Tasks	Completion Date	Report of Compliance
Complete draft facility plan	12/19/75	12/31/75
Progress report	7/1/76	7/15/76
Complete final plans and specifications	12/1/76	12/15/76
Award contract and begin construction	1/1/77	1/15/77
Progress reports	7/1/77	7/15/77
	1/1/78	1/15/78
	7/1/78	7/15/78
	1/1/79	1/15/79
Complete construction	9/1/79	9/15/79
Operational level attained	10/1/79	10/15/79

XIX

The defendant has violated the terms of the permit and has failed to comply with the terms and conditions of the permit in, among other things, the following respects:

A) The interim action of completing a "draft facility plan" on or before December 19, 1975, has not been performed by defendant.

B) The interim action of completing "final plans and specifications" on or before December 1, 1976, has not been performed by the defendant.

C) The interim action to "award contracts and begin construction" on or before January 1, 1977, has not been performed by the defendant.

D) On December 19, 1975, the defendant submitted a "preliminary final draft" of the "draft facility plan" called for in the permit. The defendant's submittal was in preliminary form and did not constitute compliance with the permit requirement for a "complete draft facility plan".

E) On July 8, 1976, the defendant submitted a progress report which stated that "copies of the Final Draft" of the facility plan were scheduled to be available by the end of March, 1977. The final draft of the facility plan, which was to be completed on December 19, 1975, has not been submitted.

G) On January 7, 1977, the defendant submitted a compliance report stating that the final plans and specifications as required by December 1, 1976, were not complete, and that awarding of the contract and the beginning of construction as required by January 1, 1977, had not yet been undertaken.

XX

Section 309(b) of the Act [33 U.S.C. § 1319(b)] provides that the Administrator may commence a civil action for appropriate relief, including permanent or temporary injunction, for any violation of any permit condition in a permit issued pursuant to Section 402 of the Act [33 U.S.C. § 1342].

XXI

Section 309(d) of the Act [33 U.S.C. § 1319(d)] provides that any person who violates any term or condition of a permit issued under Section 402 of the Act [33 U.S.C. § 1342] shall be subject to a civil penalty not to exceed TEN THOUSAND DOLLARS ($10,000.00) per day of violation.

XXII

The defendant's violations of NPDES Permit No. CA 0109991 are of a continuing nature for which there is no adequate remedy at law, and are preventing the plaintiff from achieving the goals mandated by the Federal Water Pollution Control Act, as amended. [33 U.S.C. § 1251 et seq.]

WHEREFORE, plaintiff United States of America demands judgment against the defendant City of Los Angeles:

a) To enjoin further violations of NPDES Permit No. CA 0109991.

b) For penalties in the sum of TEN THOUSAND DOLLARS ($10,000.00) for each day of violation of NPDES Permit No. CA 0109991.

c) For such other and further relief as the Court may deem just and proper.

d) For the following schedule of compliance for the elimination of the discharge of sewage sludge.

Phase	Task	Completion Date	Report of Compliance
I	Reduce sludge discharge by 40 tons per day.	August 1, 1979	August 15, 1978
II	Reduce sludge discharge by 40 tons per day for a cumulative reduction of 80 tons per day.	April 1, 1979	April 15, 1979
III	Reduce sludge discharge by 40 tons per day for a cumulative reduction of 120 tons per day.	October 1, 1979	October 15, 1979
IV	Eliminate all remaining discharge of sludge.	April 1, 1980	April 15, 1980

e) For the following schedule of compliance to upgrade the Hyperion Treatment Plant so that all wastewater discharged through discharge serial No. 002 receives secondary treatment.

Task	Completion Date	Report of Compliance
A-4 and A-12 (Secondary Treatment)		
Complete facility plan	December 1, 1977	December 15, 1977
Complete final plans and specifications	March 1, 1978	March 15, 1978
Advertise Contracts for construction	April 1, 1978	April 15, 1978
Award Contracts for construction	May 1, 1978	May 15, 1978
Begin Construction	June 1, 1978	June 15, 1978
Progress Reports	December 1, 1978	December 15, 1978
	June 1, 1979	June 15, 1979
	December 1, 1979	December 15, 1979
Complete Construction	December 1, 1980	December 15, 1980
Operational Level attained	January 1, 1981	January 15, 1981

Each Report of Compliance shall be mailed to Director, Enforcement Division, EPA, Region IX, 100 California Street, San Francisco, California 94111, not later than fifteen (15) calendar days after each completion date. Each report shall detail compliance or noncompliance with the specific task and date. If noncompliance is being reported, the reason(s) for such noncompliance shall be stated, plus an estimate of the date when the defendant shall be in compliance.

f) That Donald C. Tillman, City Engineer for the defendant, or his successor, be named the responsible official for the purpose of insuring that the Reports of Compliance requested by Subparagraphs (d) and (e) of this prayer are properly prepared and submitted in a timely fashion.

g) That the defendant pay a civil penalty of One Thousand Dollars ($1,000.00) for each and every day the defendant violate any of the requirements of Paragraph XVI(d) and (e) as hereinabove set forth.

DATED: This *10th* day of August, 1977.

ROBERT L. BROSIO
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division

/s/ Barry J. Trilling
BARRY J. TRILLING
Assistant U.S. Attorney

Attorneys for Plaintiff

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, say: I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of 18 and not a party to the within action or proceeding. My business address is

200 North Main Street
1800 City Hall East
Los Angeles, CA 90012

On February 22, 1978, I served the within

CITY'S MEMORANDUM IN REPLY TO MOTION FOR CLARIFICATION OF ORDER

on the person(s) indicated below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Raymond W. Mushal, Esq.
Attorney, Pollution Control Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Joan Z. Bernstein, Esq.
General Counsel
U.S. Environmental Protection Agency
401 M Street, S.W.
Waterside Mall
Washington, D.C. 20460

Lisa K. Friedman, Esq.
Water Quality Division (A-131)
U.S. Environmental Protection Agency
Washington, D.C. 20460

Anthony O. Garvin, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
215 Fremont Street
San Francisco, CA 94105

Robert K. Best, Esq.
Pacific Legal Foundation
455 Capitol Mall
Suite 465
Sacramento, CA 95814

Stanley E. Remelmeyer, Esq.
City Attorney
3031 Torrance Boulevard
Torrance, CA 90503

Richard R. Terzian, Esq. / Burke, Williams & Sorensen
707 Wilshire Blvd., Suite 3300, Los Angeles, CA 90017

☒—Federal—I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 22, 1978, at Los Angeles, California.

/s/ Hilda Y. Alatorre
HILDA Y. ALATORRE

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region IX
100 California Street
San Francisco, California 94111

Sept. 2, 1977

Mr. Thomas E. Hookano
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, CA 95814

Re: Request for Stay of Enforcement of NPDES Permit No. CA0109991 for City of Los Angeles Hyperion Treatment Plant

Dear Mr. Hookano:

In response to your request dated August 18, 1977, for a stay of enforcement of National Pollutant Discharge Elimination System (NPDES) Permit No. CA0109991 issued on June 2, 1977, for the Hyperion treatment plant owned by the City of Los Angeles, it is my determination that a stay of enforcement would not be warranted or in the public interest for the following reasons. First, the Complaint filed by the United States against the City of Los Angeles in the U.S. District Court for the Central District of California (C 77-3047-R) does not name as parties any of the petitioners seeking review of the permit in the U.S. Court of Appeals for the Ninth Circuit (C 77-2909). The enforcement action thus does not seek to impose penalties or otherwise affect the legal rights of the petitioners.

Second, it is the position of EPA that Section 509 (b) (1) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1369 (b) (1)) precludes review of the terms and conditions of the subject permit with the exception of the expiration date of the permit. The only change made by EPA to NPDES Permit No. CA0109991 on June 2, 1977, was to extend the expiration date of the permit from June 30, 1977, to December 17, 1979. *The substantive conditions of the permit remained in effect as issued on August 18, 1975.* Review of the substantive conditions of the permit is precluded at this date in the absence of new information not available in 1975. Since the request for a stay of enforcement submitted by the Pacific Legal Foundation does not indicate that additional information exists which was not available when the permit was issued in 1975, there does not appear to be any compelling reason to delay enforcement of the substantive conditions of the permit.

Finally, the enforcement action filed by the United States against the City of Los Angeles concerns, in part, violations which occurred prior to the extension of the expiration date of the permit on June 2, 1977. The review in the Ninth Circuit will not affect the liability of the City of Los Angeles for violations of the permit which occurred prior to June 2, 1977, since the Petition for Review seeks review only of the permit as issued on that date. There is thus no reasonable basis for staying enforcement of the permit.

Sincerely,

/s/ R. L. O'Connell
for PAUL DE FALCO, JR.
Regional Administrator

Exhibit No. 6

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. SECTION 125.36(m)

No. 66

In the matter of National Pollutant Discharge Elimination System Permit for the City of Los Angeles, CA0109991, the Regional Administrator has certified three issue of law to the Office of General Counsel for decision pursuant to 40 C.F.R. Section 125.36(m). The parties, having had the opportunity to provide written briefs in support of their respective positions,[1] present the following issues.

ISSUES OF LAW NO. I AND II

Questions Presented

1. Must EPA conduct an informal public hearing prior to taking action to extend the expiration date of an NPDES permit where public notice of the proposed action was published more than 30 days in advance of the action?

2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date? [2]

[1] Briefs were filed by EPA Region IX and by the Pacific Legal Foundation on behalf of John B. Kilroy.

[2] Kilroy urges that I address the following issue:

Whether there is authority under the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA 0109991 was the issuance of a new permit.

Decision

EPA has the authority to extend the expiration date of an NPDES permit by modification of the permit. In any permit modification proceeding an opportunity for public hearing must be provided, but a hearing must be held only if the Regional Administrator finds that there is a significant degree of public interest in the permit modification. Since Kilroy does not specifically argue that the record supporting the permit modification is inadequate this question need not be addressed.

Discussion

On April 27, 1977 a notice of a proposed modification of the NPDES permit issued to the City of Los Angeles for its Hyperion sewage treatment plant was published in the Los Angeles Times. The proposed change was to the expiration date of the permit, which was then June 30, 1977. On June 2, 1977, the permit was modified to extend its expiration date to December 17, 1979. No requests for a public hearing prior to modification of the permit pursuant to 40 C.F.R. § 125.34 were made. On June 13, 1977, John B. Kilroy requested an adjudicatory hearing pursuant to 40 C.F.R. § 125.36. That request was denied but three issues of law were referred to the General Counsel.

Kilroy is correct in arguing that federally-issued NPDES permits, no less than State-issued permits, are subject to the requirement that they be for fixed terms not exceeding five years. FWPCA § 402(b)(1)(B) read in conjunction with § 402(a)(3)), 40 CFR § 125.25. But this does not resolve the questions he raises. This requirement of the statute, and EPA regulations, does not forbid modification of the expiration date of a permit, so long as the permit, as modified, as a fixed expiration date and that date is no more than five years from the date it was established. The purpose of § 402(b)(1)(B) is clear; to insure that at intervals not greater than five

years the terms and conditions of a permit be subject to reevaluation by the Agency (or State) and that the public have an opportunity to participate in this reevaluation.[3] This purpose is not compromised by a modification of an expiration date such as occurred here, since in no event will more than five years elapse between opportunities for the Agency, and the public, to decide whether the requirements placed on the discharger should be changed.[4]

Kilroy also argues that the FWPCA and EPA regulations provide authority to modify only certain provisions of a permit and do not provide such authority with regard to the expiration date. But the Act, in § 402(b)(1)(C), says only that permits must be subject to modification for cause, without restricting the power to modify to any particular terms of a permit. Similarly, the three specific causes for modification set out in § 402(b)(1)(C) are clearly inclusive, rather than exclusive. And 40 C.F.R. § 125.22(a)(2) provides that a permit may, for cause, be modified "in whole or in part". Nothing in the statute or regulations expressly or implicitly forbids modifications of expiration dates of permits.[5]

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[3] While the proposed change in a permit may be only to its expiration date, any issue relevant to the extension, such as whether the requirements placed on the discharger should be modified, could be raised.

[4] Kilroy argues that the ability to modify the expiration date can be abused and used to frustrate the public participation requirements of the Act. Kilroy argues primarily in terms of hypothetical situations, however, and has failed to show that the practical ability of the public to participate in this particular proceeding was infringed. Whether or not abuse may occur in another situation must await another day.

[5] The provisions of 40 C.F.R. § 125.23(d) cover a particular situation when permits may be modified but do not in any way limit the Agency's ability to modify other terms and conditions. Section 125.28, characterized by Kilroy as a permit modification provision, is actually a provision for *adjustment* of effluent limitations or standards to reflect, on a case by case basis, credit for pollutants in intake water. It serves the function, therefore, of defining the terms of a permit, rather than of changing them subsequent to permit issuance. Section 301(c) of the Act serves a similar function with respect to defining BATEA for discharges who lack the economic capability to meet the national effluent limitations guidelines. Section 301(c) variances will not modify permits, but will be relevant to the requirements to be established in permits which will expire on or after July 1, 1983.

With regard to any permit modification, including a modification of an expiration date, the Agency is required to provide public notice of its intent to modify the permit and must provide an opportunity for a public hearing *See* 40 CFR §§ 125.22(a)(2), 125.32, 125.34. In addition, any interested person may request an adjudicatory hearing pursuant to § 125.36. Thus, the right of the public to be periodically apprised of the status of a discharger's permit and to participate in the permitting process is amply assured. But a public hearing need not necessarily be held. Section 402(b)(3) of the Act provides only that the public "receive notice of each application for a permit and . . . *an opportunity* for a public hearing before a ruling on each application. . . ." (emphasis added.)[6] This is precisely what the Agency's regulations provide. Section 125.32 requires public notice of the proposed issuance or modification of a permit while § 125.34 of EPA's NPDES regulations provides that the Regional Administrator *may* hold a public hearing when he determines either that there is a significant degree of public interest in a permit (§ 125.34(a)) or when he determines that a hearing may provide useful information (§ 125.34(d)). At least where there is little or no public interest expressed after public notice of a proposed modification the question of whether to hold a public hearing prior to modification of the permit is wholly discretionary.

Finally, it may be observed that Kilroy has failed to show that his legal arguments have any practical implications. Whether EPA modified the old permit or issued a new one has not been shown to have any bearing on the public participation procedures to be followed. In either case public notice would be given and opportunity for public and/or adjudicatory hearings provided. In particular, it does not appear that Kilroy's own request for

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[6] *Cf.* The Administrative Procedure Act, 5 U.S.C. §§ 553(c), 554(a), 554(c).

an adjudicatory hearing would have had to be handled any differently.

Issue of Law No. III

Question Presented

May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project? [7]

Decision

EPA has the authority to extend the expiration date of a permit which orders a permittee to go forward with a project despite the fact that the same project is being evaluated in an Environmental Impact Statement (EIS) for the purpose of determining whether a grant should be made to assist in the project's construction.

Discussion

The only legal obstacle to requiring Los Angeles to proceed with the sludge management project which Kilroy appears to raise is that it would conflict with NEPA. But § 511(c) of the FWPCA clearly provides that the EIS requirements of NEPA do not apply to the permit at issue here. The permit for the Hyperion plant is neither a grant of federal financial assistance nor a permit for a new source as defined in Section 306(a)(2) of the FWPCA. Obviously, if NEPA does not apply to the permit issuance it does not apply to extension of the expiration date.

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[7] Kilroy phrases the issue as:

> Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1281, *et seq.*

Recently, in *Pacific Legal Foundation* v. *Quarles*, No. 77-521-HP (C.D. Cal. July 20, 1977) the court, dealing with issues raised with regard to the very permit involved here, held that, "the language of Section 511(c) leads to the conclusion that the EPA can, without an EIS, order Los Angeles to build the interim sludge disposal project while the EPA is prevented, until it prepares an EIS, from awarding a grant to help pay for the project." Slip op. at 6. There thus appears to be no reason why the pendency of the EIS concerning funding of the sludge management project causes any legal problems to arise with regard to the NPDES permit.

October 18, 1977

/s/ Joan Z. Bernstein

AFFIDAVIT OF DONALD CALVIN TILLMAN

I, DONALD CALVIN TILLMAN, being duly sworn, hereby depose and say:

1. I am currently employed as City Engineer of the City of Los Angeles (City hereinafter). As such, I manage the operations of the Bureau of Engineering, which is responsible for design and construction engineering for the City's wastewater system. The Bureau is contained within the City's Department of Public Works.

2. I have knowledge of and supervise the engineering for the following proposed projects:

a. The conception, design, and construction of an interim system to process and dispose of sludge other than by ocean discharge from the Hyperion Treatment Plant (interim sludge hereinafter);

b. The conception, design, and construction of a permanent system to process and dispose of sludge (ultimate sludge hereinafter); and

c. The conception, design, and construction of facilities to convert the Hyperion Treatment Plant from partial (presently about 30% or 100 million gallons of 330 million gallons per day) to full secondary treatment (full secondary conversion hereinafter).

3. The currently estimated capital cost of interim sludge is $15,800,000.00.[1] To date, the City has by contract committed $2,037,614.00 and appropriated an additional $3,510,736.00 of its funds to this project.

4. The estimated capital cost of ultimate slude is currently $76 million.[1, 2] The conception and design of this system have not been completed.

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[1] Such costs inculde projected contract commitments, City labor, and City overhead (indirect costs calculated as a proportion of City labor).

[2] Exclusive of City expenditures for the LA/OMA Project, which is discussed hereinafter at Paragraph 13.

5. The currently estimated capital cost of full secondary conversion is $282,000,000.00.[1] This amount includes the estimated $55,767,000.00 cost of the proposed Sepulveda Water Reclamation Plant. To date, the City has appropriated about $12,000,000.00 for project design.[3] In addition, the City and its contract agencies have funded about $3,200,000.00 of the $16,000,000.00 cost of the recently completed Los Angeles/Glendale Water Reclamation Plant. The Sepulveda and Los Angeles/Glendale Water Reclamation Plants provide additional capacity which is necessary to give secondary treatment to all of the City's wastewaters, and these facilities were located upstream of the Hyperion Treatment Plant due to the limited space at the Hyperion site, economic considerations, and water reclamation needs.

6. I am informed that, aside from the Los Angeles/Glendale Water Reclamation Plant, the capital and indirect costs of the interim sludge, ultimate sludge, and full secondary conversion projects are grant eligible. The City could receive a maximum of 75% and 12½% grant funding from the Federal Government and State of California, respectively.

The sludge and full secondary conversion projects are mandated to be constructed under the National Pollutant Discharge Elimination System (NPDES hereinafter) Permit which is the subject of the petitions for review before the Court.

No grant funds for any of these projects, aside from the Los Angeles/Glendale Water Reclamation Plant, have been received as yet by the City.

7. Operation and maintenance costs (all amounts in this paragraph are direct costs) for the City's existing wastewater system, of which the Hyperion Treatment Plant constitutes a major part, are estimated for fiscal year 1977-78 to be $13,335,132.00. The estimated annual operation and maintenance costs for interim sludge are an additional $10,726,000.00; such costs for ultimate sludge cannot be estimated at this time. The annual

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[3] Such amount does not include City overhead.

operation and maintenance costs of full secondary conversion (including the upstream facilities) is estimated to be an additional $13,000,000.00.

I am informed that operation and maintenance costs are not grant eligible.

8. The Los Angeles City Controller's Preliminary 1967-77 Report indicates that the total city expenditures for fiscal year 1976-77 were $934,619,521.00. Of this amount, controllable expenditures totaled $755,827,284.00, and noncontrollable expenditures totaled $178,842,237.00.

9. Having previously taken a number of actions committing resources to these projects, the City has adopted the following course of action with regard to the NPDES Permit requirements, as recommended by the Mayor and adopted by the City Council on September 1, 1977:

a. Proceed with a good faith effort to cease the ocean discharge of sludge on an interim basis;

b. Support legislative efforts in Congress to modify the secondary treatment requirements under the Federal Water Pollution Control Act; and

c. Protect the City's interests by defending or initiating litigation.

10. The City questions the scientific and environmental wisdom of the Environmental Protection Agency (EPA hereinafter) policy to cease the ocean discharge of sludge as applied to the Hyperion Treatment Plant, given the serious problems which exist with land and other alternative disposal methods. The City is challenging the legality of the EPA's sludge-out policy in the courts. Until such time as that policy is invalidated, the City intends to demonstrate its good faith by proceeding with the interim sludge project. The City is also proceeding in good faith with the project to convert the Hyperion Treatment Plant to full secondary treatment, although pending legislative modifications may delay or obviate the necessity of this project.

11. The Board of Public Works of the City of Los Angeles approved on November 2, 1977 a two-phase interim sludge-out schedule whereby construction of Phase I and a 25% reduction of current ocean sludge discharge

will be attained by July 15, 1979, and construction of Phase II and the 100% elimination of current ocean sludge discharge will be attained by April 1, 1980. The estimated total cost of Phase I (design, construction, and contract administration) is $11,033,000.00, with Phase II requiring the expenditure of an estimated additional $4,467,000.00 ($2,267,000 for Phase II construction and $2,000,000.00 for centrate treatment to be constructed later).

12. On October 20, 1969 the City entered into a joint powers agreement with the Sanitation Districts of Orange County, the Sanitation Districts of Los Angeles County, the Ventura Regional County Sanitation District, and the City of San Diego by which was created the Southern California Coastal Water Research Project Authority (SCCWRP hereinafter). The operating term of SCCWRP, which has an independent Scientific Consulting Board, has been extended by agreement until June 30, 1979. The purposes of SCCWRP include increasing the scientific knowledge of the coastal waters of Southern California in order to ensure the protection and conservation of marine resources and to gather and analyze data regarding the near-shore environmental effects of treated wastewater and wastewater solids diffusion. The results of SCCWRP studies are issued in technical reports. To date, the cost to the City of the SCCWRP studies has been $1,403,743.00, which represents the City's proportionate cost of SCCWRP based upon its percentage of the total flow discharged to the Pacific Ocean from the sewage plants under the authority of the signatories to the agreement. In addition to the joint powers agreement, SCCWRP has received separate research grants from the EPA, the California State Water Resources Control Board (SWRCB hereinafter), and others.

13. On October 9, 1974 a joint powers agreement was entered into by the City, the Sanitation Districts of Orange County, and the Sanitation Districts of Los Angeles County to establish the LA/OMA Project (short for Regional Wasterwater Solids Management Program for the Los Angeles/Orange County Metropolitan Area). The LA/OMA Project, whose purpose is to evaluate alterna-

tive sludge management systems and develop a regional sludge management plan, includes participation by Region IX of the EPA and the SWRCB. The estimated total project cost is $3,400,000.00. I am informed that all but $75,000.00 of this amount is grant eligible, with EPA funding $75%, the SWRCB funding another 12½%, and the three local agencies equally sharing the cost of the remaining 12½%. The $75,000.00 figure represents the cost, shared equally by the local agencies, of a study of the ocean disposal of sludge, which has been deemed ineligible for funding by the EPA and the SWRCB. The City has appropriated $300,000.00 and has actually committed by contract $163,541.00 of its funds to the LA/OMA Project, whose final report is due by mid-1979.

Executed on November 23, 1977 at Los Angeles, California.

/s/ Donald Calvin Tillman
DONALD CALVIN TILLMAN

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Subscribed and sworn to before me this 23rd day of November, 1977 at Los Angeles.

/s/ M. Jean Drumright
M. JEAN DRUMRIGHT

[OFFICIAL SEAL] Notary Public in and for the State of California, Los Angeles County. My Commission Expires Oct. 11, 1981.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Region IX
215 Fremont Street
San Francisco, Ca. 94105

In reply refer to:

E-4-1
RIN 77F-91
David M. Shell
Law Clerk
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, Ca. 95814

Dec. 20, 1977

Dear Mr. Shell:

As you requested in your letter of December 12, 1977, pursuant to the Freedom of Information Act, enclosed is a copy of the public notice for the City of Los Angeles—Hyperion Treatment Plant National Pollutant Discharge Elimination System modification which extended the expiration date of the permit to June 30, 1977.

If you have any questions, please contact our Permits Branch at (415) 556-3450.

Sincerely,

/s/ R. L. O'Connell
R. L. O'CONNELL
Director, Enforcement Division
Enclosure

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Special Announcements 1900

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- ABBOTT SCIENTIFIC
- AERONUTRONIC—RH
  AIRESEARCH MANUFACTURING CO
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- ALTEC
- AMDAHL—854
  AMERICAN MICROSYSTEMS
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  AMERICAN
  TELECOMMUNICATIONS
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- ACMC
- API—RH
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- BARCO OF CALIF.
- BECHTEL—854
  BELL OPERATIONS CORP
  An equal opportunity employer
  Ft. Worth, Texas
  BELL HELICOPTER INT'L
  Bedford, Texas
- BELL & HOWELL
  BENDIX
  Field Engineering Corp.
  BENNETT
  Specialties
- Bergen Brunswig
- BERTEA CORPORATION
- BICQUEST
- BLUE CROSS-RH
  BOB'S
  "Home of the Big Boy"
  BOURNS
  1200 Columbia Avenue
  Riverside, Calif. 92507
- Brentwood Savings
- Brown & Root—854
- BUTLER-ARDE
- BUY BONDS
- Buy Bonds

- MAY COMPANY
- C GAW LABORATORIES
- MENASCO
- 1 2 3 Messenger Service
- MOTHERWOOD MATERNITY
- NATIONAL SEMICONDUCTOR
  NETTER Mfg Co
  Equal Opportunity Employer M/F
- Norman Engineering-RH
- OCCIDENTAL LIFE
- Occidental Research
  OMRON
  Fine Inquiry Dept
- Optical Radiation
- OTI
- PABST BREWING CO.
- PAPER MATE #1
- Paul Munroe Hydraulics
- PENNSYLVANIA LIFE INS.
- PETERBILT—854
- Piedmont Management
  POMONA Valley
  Community Hospital
- Professional Seminars—845
- #1 QUOTRON SYSTEMS
- RACHELLE LABS, INC.
- RCA—842
  REDMAN
  MOBILE HOMES INC.
- #1 REVELL INC.
- RITE AUTOTRONICS
- Rockwell Int'l.
- Rockwell International
  COLLINS RADIO NEWPORT BEACH
- Rockwell—842
- ROLM—854
- ROSS LOOS—R
  ROSEMOUNT, INC.
  An Equal Opportunity Employer m/f
- SANTA FE
  Engineering & Construction
- SARGENT INDUSTRIES
  SEASONS GREETINGS
  The Boeing Company
  Getting people together.
- Security Pacific
- Shepherd Machinery 10
  SHOP AT
- THE BROADWAY
- SINGER
- ☆ SMITH TOOL
- SOLAR-SAN DIEGO
- SPACELABS, INC.
- Spar Aerospace—842
- SPECTROLAB-RH

- CURTIS INDUSTRIES
  CURTIS WRIGHT
  Equal Opportunity Employer
- D.M.J.M.
- Dataproducts-R
  DFL Peterson & Assoc Employment
  Fremont, Nebr. 402 721 4329
  DIGITAL-854
- Drink 7-Up 852
- DRINK COCA-COLA
  FAIRCHILD
  MICROSYSTEMS
- EECO
- ELCO CORPORATE
- Electro Optical Systems
- ENCINO HOSPITAL
  ENGINEER, Industrial See Sun. ad.
  Parker Seal
- EPRI—854
- Superior Industries
- System Development
- SYVA—854
- TASK CORP.
  TEKTRONIX, INC.
  An Equal Opportunity Employer m/f
- TELEDYNE INET
- TELEDYNE—RH

closing cleaning [illegible]
1 yr. motor racing for [illegible]
commercial [illegible] valid Calif. driv.
[illegible] 24/7 per mo. + rm & board
Times Dec 19/21
COUPLE for two little girls & baby
boy while parents work. Oldest girl
in school. Separate guest house
[illegible] Weekends off. [illegible]
[illegible] Sea Bluff, San
[illegible] Co. [illegible]
[illegible] Live in. Pleasant
[illegible] Spanish speak-
ing OK, must have some English
[illegible] 5 days & Weekends off. Good
Salary New girl on [illegible]

HOUSEKEEPER

Over 40 Must drive. Lovely private
room & bath, no pets or kids. $500
per month. Call today! 213-
[illegible] or 213-[illegible]

HOUSEKEEPER. Livein Couple [illegible]
HOUSEMAN—Exp. Must READ, Sal. [illegible]
[illegible] home. [illegible]
HOUSEMAN, live-in, must like [illegible]
[illegible] 3 yr. Sml sal [illegible]
HELPER —Livin to drive & care for el-
derly man recovering from [illegible]
fractured or rel's. 213 [illegible]
HOUSE-LT. Helper & cooking. Live in.
person w/car. Own rm., Bl., TV, Pa-
[illegible] Salary open. 213/397-7100
[illegible] 5 da. liv. in priv. rm. &
$500/mo. Bev. Hls. Refs. 213/271-[illegible]
HSKPR—Live in. 2br. apt. [illegible]
Ones Salary open. 213/[illegible]
LIVE-IN—Life hsbg. for elderly. [illegible]
Must drive. 213/[illegible]
YOUNG Hskpr—Cook with car. Live in/
out. Mod. home. 213/474-[illegible]

Jobs Offered Couples 2203

COUPLE COUPLE ONLY
Over 40 Live-in house parents for 6
teenage boys. Hi Desert. $650 mo.
[illegible] benefits.
[illegible] Calif.

LEGAL NOTICES 1900

LEGAL NOTICES 1900

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION
107 South Broadway—Room 4027
Los Angeles, California 90012
(213) 620-4460

Public Notice No. 76-153

NOTICE
Applications for and Revision of Waste Discharge Requirements
(National Pollutant Discharge Elimination System Permits)

The following Waste Discharge Requirements are proposed to be revised or amended:

NPDES NO.	NAME
CA 0109991	City of Los Angeles, Hyperion Treatment Plant

DISCHARGE LOCATION (Receiving Waters)	TYPE OF WASTE VOLUME
12000 Vista Del Mar Boulevard, Playa del Rey (Santa Monica Bay)	municipal waste water —1,256,900 cubic meters (340 million gallons) per day

On the basis of preliminary staff review and application of lawful standards and regulations, the California Regional Water Quality Control Board, Los Angeles Region, tentatively proposes to revise waste discharge requirements, including effluent limitations and special conditions. Persons wishing to comment upon or object to the tentative discharge requirements are invited to submit same in writing to the above address no later than January 23, 1977. All comments or objections received by that date will be considered in the formulation of final determinations regarding the waste discharges.

If no objections are received, the Regional Board will revise waste discharge requirements. A public hearing will be held by the Board on January 24, 1977, at 10:00 a.m., 107 South Broadway, Room 1138, Los Angeles, California. Interested persons are invited to attend. The Board will hear any testimony pertinent to the waste discharge and the tentative waste discharge requirements. Oral statements will be heard, however, for the accuracy of the record, all important testimony should be in writing.

The hearing on City of Los Angeles, Hyperion Treatment Plant will be a joint hearing with the Environmental Protection Agency, Region IX who also proposes to modify NPDES Permit No. CA0109991.

The Reports of Waste Discharge, revised documents, tentative requirements, comments received, and other information are on file and may be inspected at 107 South Broadway, Room 4027, Los Angeles, California, 90012, between the hours of 8:00 a.m. and 5:00 p.m. Arrangements for copies may be made.

Date Dec. 15, 1976

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Region IX
215 Fremont Street
San Francisco, Ca. 94105

In reply refer to:

E-4-1
RIN 77F-91

David M. Shell
Law Clerk
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, Ca. 95814

Dec. 20, 1977

Dear Mr. Shell:

As you requested in your letter of December 12, 1977, pursuant to the Freedom of Information Act, enclosed is a copy of the public notice for the City of Los Angeles—Hyperion Treatment Plant National Pollutant Discharge Elimination System modification which extended the expiration date of the permit to June 30, 1977.

If you have any questions, please contact our Permits Branch at (415) 556-3450.

Sincerely,

/s/ R. L. O'Connell
R. L. O'CONNELL
Director, Enforcement Division
Enclosure

SUPREME COURT OF THE UNITED STATES

No. 78-1472

DOUGLAS M. COSTLE, Administrator,
Environmental Protection Agency, PETITIONER

v.

PACIFIC LEGAL FOUNDATION, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 11, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 297846 41

Supreme Court, U. S.
FILED
APR 25 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1472

DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency,
Petitioner,

v.

PACIFIC LEGAL FOUNDATION; JOHN B. KILROY, SR.; THE CITY OF TORRANCE; and THE CITY OF LOS ANGELES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PACIFIC LEGAL FOUNDATION AND JOHN B. KILROY, SR.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PACIFIC LEGAL FOUNDATION AND JOHN B. KILROY, SR.

STATEMENT

Respondents Pacific Legal Foundation (hereinafter PLF) and John B. Kilroy, Sr., accept the statement of facts set forth in the petition with the exception of the following necessary corrections and additions.

As set forth in the following argument, PLF and Kilroy disagree with the characterization of both the meaning and the impact of the decision below as expressed by the

Environmental Protection Agency (hereinafter EPA) in section 4 of the statement of facts at 10-11. In addition, there is no merit to the suggestion on pages 8-10 of the petition that issues of law developed by EPA in separate proceedings initiated by EPA and the response by Kilroy thereto establish the lack of factual disputes to be considered in the adjudicatory hearing requested by Kilroy. Kilroy's participation in such agency initiated collateral proceeding was solely to ensure the exhaustion of administrative remedies.

Several material facts have been omitted relating to the action taken by EPA and the failure to provide PLF and Kilroy with an adjudicatory hearing or any other opportunity to participate:

1. The permit issued August 18, 1975, expired by its terms on February 1, 1977.

2. On November 18, 1976, EPA issued a negative declaration which made public EPA's description of the interim sludge disposal project required by the permit. (The permit contained compliance deadlines but no project description.) A public controversy ensued. Appendix A at A-5.[1]

3. On December 15, 1976, EPA announced its intention to issue a *new* permit.

4. During the comment period on the new permit issuance PLF submitted a letter objecting to certain permit requirements and expressly requesting that they not be included in a new permit.

[1]The materials reproduced in Appendices A and B are part of the supplemented record before the court of appeals.

5. On January 24, 1977, EPA announced that the expiration date of the *old* permit was extended to June 30, 1977, to give additional review time to consider the tentative waste discharge requirements prior to the expiration of the permit. Administrative Record, Exhibit 7.

6. On February 14, 1977, PLF and Kilroy filed a lawsuit challenging the negative declaration issued on November 18, 1976, and the failure of EPA to consider the adverse environmental impacts which would occur.[2]

7. On April 18, 1977, the EPA Regional Administrator signed a declaration which acknowledged the controversy and agreed to withhold federal funding for the project until an environmental impact statement was prepared. Appendix A.

The effect of the challenged action taken on June 2, 1977, extending the *old* permit was to require *immediate* implementation of the project without regard to the public controversy, to the promised review of discharge requirements, or to the findings of the environmental impact statement.

REASONS FOR DENYING THE WRIT

A. The Decision of the Court of Appeals Does Not Conflict with Decisions of this Court

The petition asserts a conflict between the decision of the court of appeals in this case and the decision of this Court in *National Independent Coal Operators' Association v. Kleppe*, 423 U.S. 388 (1976). Petition at 13. The court of appeals acknowledged that some language in the *National*

[2]*Pacific Legal Foundation v. Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977), appeal pending, No. 77-3844 (9th Cir.).

Coal Operators decision suggests that a failure to request a hearing would operate as a waiver of a right to a hearing. *Pacific Legal Foundation v. Costle,* 586 F.2d 650, 658-59 n.3 (9th Cir. 1978); Petition at 19a n.3. However, the substantial factual distinctions between the two cases clearly justify the conclusion by the court of appeals that the language of the *National Coal Operators* decision does not determine the question of whether an adjudicatory hearing should have been conducted in this case. The most significant distinctions include:

1. The coal operators had received actual notice from the Secretary of the Interior of the proposed assessment. Neither PLF nor Kilroy received actual notice of the proposed extension of the permit because EPA, even though it knew of the interest and concerns of these parties, used constructive notice in the form of a newspaper advertisement.

2. The regulations of the Secretary of the Interior expressly provided that if a coal operator failed to request a hearing within 15 days he would be "'deemed to have waived . . . his right of formal adjudication and opportunity for hearing.'" *National Coal Operators,* 423 U.S. at 394. EPA regulations contain no similar provision.

3. The coal operators failed to comply with the requirement in the regulations of the Secretary of the Interior that a hearing be requested within 15 days. Kilroy did request an adjudicatory hearing within the 10-day period established by EPA regulation. EPA denied the request.

4. The coal operators did not seek in court to require an adjudicatory hearing. The issue presented was whether

the assessment of civil penalties could be imposed "without making formal 'findings of fact' even though no hearing was requested." *National Coal Operators,* 423 U.S. at 397. PLF and Kilroy brought this action to obtain the right to be heard in an adjudicatory hearing which the agency had refused to conduct after receiving Kilroy's request.

Considering the substantial differences in the regulations governing the provision of hearings and considering the substantial differences between the actions of the complaining parties and the relief they sought, the court of appeals correctly concluded that this case is not controlled by *dictum* in the *National Coal Operators* decision.

It must also be recognized that the decision of the court of appeals did apply the legal principles set forth in *National Coal Operators* and, for this reason, is not in conflict with that decision. In the decision below the court said:

> "It must be shown that the material facts supporting the decision are not subject to dispute." *Pacific Legal Foundation v. Costle,* 586 F.2d at 658-59 (footnote omitted); Petition at 19a.

In *National Coal Operators,* this Court in describing the holding of the court of appeals identified the same principle:

> "[T]he operator does not dispute the proposed order, including the factual basis of the violation." *National Coal Operators,* 423 U.S. at 396.

The differences in result between the two cases followed from the application of the same principle to substantially different factual situations, not from a conflict between the legal principles applied.

B. The Petition Requests this Court to Review Evidence and Discuss Specific Facts Not Determined by the Court of Appeals

The question presented as set forth by the petition contains at least three assumptions of factual matters:

1. That there was due notice of the proposed action;

2. That no one requested a hearing before the proposed action was taken; and

3. That the subsequent request for hearing did not raise material issues of fact.

These factual premises are inconsistent with the facts of the case.

The question of due notice was in substantial dispute before the court of appeals. Kilroy did not see the notice published in the *Los Angeles Times* and despite a standing dispute with EPA over the content of the permit, including an exchange of letters and active litigation in progress, neither PLF nor Kilroy received actual notice of the proposed action. At the time the action was taken, PLF and Kilroy, based upon information they had received that a hearing had been completed, were actively attempting to determine the status of the proceeding. EPA would not release the requested information in response to several telephone contacts. It was necessary to file a Freedom of Information Act request for this information. *See* Appendix B. Only on the day the Freedom of Information Act request was received did EPA call PLF on the telephone with the information that the action had been taken. Under these circumstances the conclusion by the court of appeals that PLF and Kilroy could not be found to have waived an

adjudicatory hearing is consistent with the decisions of this Court which have recognized that under similar circumstances a "mere gesture" for providing notice by "an advertisement in small type inserted in the back pages of a newspaper" is insufficient to put interested persons on notice of the obligation to assert the right to a hearing. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1949).

The Court should also note that the claim by EPA that "[p]ersons who chose not to make such a request [for direct notice] must rely on newspaper notice" (Petition at 15 n.12) is a misrepresentation of the notice requirements in 40 C.F.R. § 125.32(a). The primary requirement for notice is that it "shall be circulated in a manner designed to inform interested and potentially interested persons." The provisions relating to direct notice to those who request it and newspaper publication are only two of several requirements listed as the *minimum* acceptable actions.[3]

---

[3] 40 C.F.R. § 125.32(a) provides:

"(a) Public notice of the proposed issuance, denial or modification of every permit or denial shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny, or modify a permit for the discharge. Public notice of hearings shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the intention to hold a hearing regarding the issuance of or denial of a permit for the discharge. Procedures for the circulation of public notice shall include at least the following:

"(1) Notice shall be circulated within the geographical area of the proposed discharge; such circulation shall include any one of the following:

"(i) Posting in the post office and public places of the municipality nearest the premises of the applicant in which the effluent source is located;

"(ii) Posting near the entrance to the applicant's premises and in nearby places; or,

The clear implication of the decision by the court of appeals is that under these facts, PLF and Kilroy were clearly "interested persons" and were not accorded "due notice." *See Pacific Legal Foundation v. Costle,* 586 F.2d at 658-59 n.3; Petition at 19a n.3.

On the subject of a request for a hearing, the regulations of EPA do not provide an opportunity to request an adjudicatory hearing until after a "determination with regard to a permit" has been made. 40 C.F.R. § 125.36(b)(1). Kilroy complied with these procedures. EPA's claim that PLF and Kilroy were required to request an adjudicatory hearing prior to the determination "in response to EPA's published notice of its proposed action" (Petition at 14-15) is in direct conflict with EPA's own regulations. It is obvious that had a request for an adjudicatory hearing been submitted before the action was taken, it would have been denied as premature and not authorized by the regulations.[4]

The final factual assertion by EPA that there were no material issues of fact to be considered in an adjudicatory hearing is indicative of the agency's attempt to hide from the issues in this case. EPA was well aware that PLF and

"(iii) Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation.

"(2) Notice shall be mailed to the applicant, Federal and State fish, shellfish and wildlife resource agencies, and other appropriate government agencies, and to any person or group upon request and shall provide an opportunity to submit their written views and recommendations on each proposed issuance.

"(3) The Regional Administrator shall add the name of any person or group upon request to mailing list to receive copies of notices within a State or within a certain geographical area."

[4]The confusion as to when an adjudicatory hearing must be requested stems primarily from the fact that EPA's regulations do not provide an opportunity for an adjudicatory hearing prior to the determination of the action as is required by Section 402(a)(1) of the Federal Water Pollution Control Act, 33 U.S.C. § 1342(a)(1).

Kilroy had substantial concerns about the environmental impact of the actions required in the permit. EPA had stipulated that it would address the factual issues of these impacts. Petition at 7-8 n.8. Appendix B. It was based upon this stipulation that Kilroy requested that the environmental impacts be considered in an adjudicatory hearing before the permit was modified.[5] Likewise, the claim by Kilroy that the "record developed" was inadequate obviously related to the lack of consideration of the factual issues. One does not request an "adequate record" for the consideration of issues of law. Moreover, in the court of appeals, EPA readily admitted that the hearing request raised factual issues:

> "[H]is request raised only procedural legal issues and issues concerning the land-based sludge disposal method used to implement the sludge phase-out conditions of the permit." Brief for Respondents at 38.

These "issues concerning the land-based sludge disposal method" are the exact factual issues which the court of appeals identified as being in dispute and requiring an adjudicatory hearing. *Pacific Legal Foundation v. Costle,* 586 F.2d at 659; Petition at 20a-21a.

Petitioner has fashioned the question presented so as to require this Court to review evidence and discuss at least three significant factual issues which were in dispute before the court below. Moreover, since these issues were not determined as set forth in the petition, it is a request that this Court rule on a hypothetical case.

[5]Kilroy's request for an adjudicatory hearing is reproduced in Appendix B to the Petition at 25a-26a.

C. The Decision of the Court of Appeals Does Not Present a Serious Hindrance to Effective Administration of the Federal Water Pollution Control Act

The apparent motivation for the petition seeking review in this Court is the conclusion expressed at 15-17 that the administration of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.*, will "become hopelessly bogged down" because the decision of the court of appeals requires EPA to routinely hold numerous unnecessary adjudicatory hearings. The decision below will create no such result.

The court of appeals expressly and with great care limited its decision to the facts of this case:

> "Yet, *on this record* we can conclude unequivocally neither that the parties have no dispute about these matters nor that they do. *Under these circumstances* we are unable to deny an adjudicatory hearing on the ground that none of the material facts upon which the EPA's decision rests are disputed. Although ordinarily we might conclude that a silent record reflects no disagreement as to material facts, *the special circumstances of this case* cautions us against that course here. We acknowledge that, should a showing on remand be made in a proper manner that no dispute as to material facts exists, *it would be necessary for us to reconsider our holding* that no 'opportunity for a hearing' was provided." *Pacific Legal Foundation v. Costle,* 586 F.2d at 659 (emphasis added); Petition at 21a.

The effect of the decision of the court of appeals is to require that EPA support a refusal to provide an adjudicatory hearing with a record which demonstrates "that the material facts supporting the decision are not subject to

dispute." *Pacific Legal Foundation v. Costle*, 586 F.2d at 658-59; Petition at 19a. Petitioners without any substantiation imply that this ruling significantly modifies present requirements for an opportunity for a hearing. Petition at 12-13 and 16-17. However, EPA's own regulations already require that a hearing must be held under similar circumstances even though no request has been received. These regulations establish a lesser threshold finding to require a hearing than that established by the court of appeals. Title 40, Code of Federal Regulations, § 105.7(c) provides:

> "(c) *Opportunity for Hearings.* Where the opportunity for public hearing is called for in the Act, and in other appropriate instances, a public hearing should be held if the hearing official finds significant public interest (including the filing of requests or petitions for such hearing) or pertinent information to be gained. Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunity for public participation."[6]

This regulation expressly refutes the contention in the petition that hearings must be granted only on receipt of a request. The minimal threshold test established by the regulations for determining whether a hearing should be held without a request—whether there is "pertinent information to be gained"—is clearly less rigorous than that employed by the court of appeals. Therefore it is impossible to believe EPA's unsubstantiated assertion that there is a significant number of cases in which the decision of the

---

[6] *See also* 40 C.F.R. § 125.34(a):
"[W]here the Regional Administrator finds a significant degree of public interest in a proposed permit or group of permits, he shall hold a public hearing to consider such permit . . . ."

court of appeals would require a hearing which is not already required by regulation.

The claimed burden on EPA is particularly unlikely since the conclusion of the court below follows from the application of the adjudication requirements of the Administrative Procedure Act, 5 U.S.C. §§ 554, 556, and 557.[1] *Pacific Legal Foundation v. Costle,* 586 F.2d at 658; Petition at 17a.

Under the Administrative Procedure Act provisions quoted by the court of appeals in its decision, an adjudicatory hearing is required only when there is a controversy *and* the parties are unable to resolve that controversy short of hearing. 5 U.S.C. § 554(c). Therefore, considering the " 'relatively small percentage of cases' " (Petition at 16) which apparently involve significant dispute, there will be little, if any, increased burden on EPA. This conclusion is reinforced by the fact that an adjudicatory hearing is already available in cases in which there are disputed facts under present EPA regulations. 40 C.F.R. § 125.36.

To bolster the questionable claim of great administrative burden EPA suggests that "all a complainant need do in order to set aside the Agency's action, under the court's decision, is to suggest plausibly in the court of appeals that some members of the public might disagree concerning factual matters implicated by the Agency's action." Petition at 16. The decision says no such thing. The court of appeals clearly indicated that review of an EPA decision not to conduct an adjudicatory hearing would be conducted as

[1]Petitioner has not taken exception to the holding by the court of appeals that Section 402(b)(1) of the Federal Water Pollution Control Act requires the application of the adjudication provision of the Administrative Procedure Act.

with other administrative action by determining whether the record supported that determination. The court stated that it would look to see "whether a showing has been made demonstrating that a hearing is unnecessary" (*Id.* at 658; Petition at 18a) and that on a proper record "it would be necessary for us to reconsider our holding" (*Id.* at 659; Petition at 21a). The record presented in this case, however, was "barren of any explanation." *Id.* at 660; Petition at 22a. The court also noted that it would not order a hearing where it "would be futile" (*Id.* at 659; Petition at 20a) or "would be useless" (*Id.* at 660; Petition at 22a). There is no basis in the decision for a conclusion that a mere suggestion to the court of appeals of a plausible factual issue would result in the remand of an otherwise proper decision not to conduct an adjudicatory hearing.

Petitioner also misreads the decision of the court of appeals as acknowledging the existence of the burden of which EPA complains. Petition at 16. The cited portion of the decision, however, is not discussing administrative burdens from conducting hearings but the " 'heavy burden of justification' " resting on the agency when refusing to allow a hearing. *Id.* at 658-59; Petition at 18a-20a. EPA made no factual showing to the court of appeals that a significant administrative burden would result from providing hearings under the facts of this case. The petition likewise fails to make any such showing. Instead, EPA relies on the unsubstantiated assumption that interested persons who desire adjudicatory hearings which are readily available to them on request under EPA regulations will instead flock to the court of appeals to obtain orders for such hearings.

Such unfounded speculation is hardly a worthy basis to invoke the review of this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari does not raise a substantial issue worthy of consideration by this Court and should be denied.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
THOMAS E. HOOKANO
Attorneys for Respondents
Pacific Legal Foundation
and John B. Kilroy, Sr.

April, 1979

(Appendices Follow)

Appendices

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PACIFIC LEGAL FOUNDATION, et al., Plaintiff, v. JOHN R. QUARLES, JR., et al., Defendants.	Civil No. 77-0521 HP Affidavit of Paul De Falco, Jr.

State of California
County of San Francisco } ss

Paul De Falco, Jr. being duly sworn, deposes and says:

1. I am the Regional Administrator, Region IX, United States Environmental Protection Agency (EPA), San Francisco, California. In my capacity as Regional Administrator, I am the chief executive officer for EPA in Region IX and am responsible for administration of EPA's programs in Arizona, California, Hawaii, Nevada, Guam, American Samoa, and the Trust Territories.

2. Under Title II of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. §1281 *et seq.*, the Administrator of EPA is authorized to award grants to municipalities for construction of wastewater treatment facilities. The authority of the Administrator of EPA to award grants under Title II of FWPCA has been delegated by the Administrator to the Regional Administrators of EPA.

3. Under an agreement signed May 23, 1975, general administration of the construction grant program of Title II of FWPCA was delegated to the California State Water Resources Control Board (SWRCB). The agreement, however, did not delegate to the SWRCB the actual authority to award Federal construction grants. The final decision making authority for award of Federal construction grants in California is thus my responsibility as Regional Administrator.

4. On August 22, 1975, the City of Los Angeles submitted an application for a grant under Title II of FWPCA, for construction of an interim sludge processing and disposal system for the Hyperion treatment plant. The City had previously submitted a Project Report to EPA in 1975 which discussed the feasibility of the Interim Sludge Project.

5. The proposed Interim Sludge Disposal Project is designed to eliminate the discharge of sewage sludge to the ocean from the Hyperion plant until an ultimate solution for the disposal of sludge is developed. The City of Los Angeles is presently a participant in a cooperative effort with Los Angeles County and Orange County to develop a facilities plan and joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) regarding alternatives for the ultimate disposal of sewage sludge. This effort is partially funded by a grant from EPA under Title II of FWPCA.

6. In accordance with EPA's Guidelines for Compliance with NEPA in the Title II Wastewater Treatment Works Construction Grants Program (40 C.F.R. §6.512), EPA prepared an Environmental Impact Appraisal for the Interim Sludge Disposal Project which was issued on November 18, 1976. (Attachment Q, Memorandum in Support of Motion To Dismiss). The Environmental Impact Appraisal contained a discussion of the anticipated impact of the project on the environment, a discussion of mitigation measures to be taken, and a discussion of alternatives to the proposed project.

7. On the basis of the Environmental Impact Appraisal and the EIR prepared by the City of Los Angeles, EPA issued a Negative Declaration on November 18, 1976, regarding the environmental impact of the Hyperion interim sludge project. (Attachment P, Memorandum in Support of Motion to Dismiss). The Negative Declaration stated that it was EPA's conclusion that the proposed project would not have significant environmental impacts and that EPA had made a preliminary decision not to prepare an Environmental Impact Statement.

8. The City of Los Angeles is presently developing a facilities plan covering all aspects of future wastewater treatment, which is referred to as the City of Los Angeles Wastewater Facilities Plan. This plan will include a detailed discussion of alternative means of achieving effluent limitations based upon secondary treatment at the City's existing treatment facilities and a discussion of the Interim Sludge Disposal Project. The City and EPA are also developing a joint EIR/EIS covering the environmental impact of the City of Los Angeles Wastewater Facilities Plan. Preparation of the plan and the joint EIR/EIS is partially funded by a grant from EPA under Title II of FWCPA.

9. The EIR/EIS for the City of Los Angeles Wastewater Facilities Plan will include a detailed analysis of the potential environmental impact of the Interim Sludge Disposal Project. This analysis will include a discussion of alternatives to the Interim Sludge Disposal Project and a discussion of the environmental impacts of the present disposal of sludge to the ocean.

10. In view of the controversy regarding the Hyperion Interim Sludge Project which arose subsequent to the issuance of the Negative Declaration and Environmental Impact Appraisal, I have decided that EPA should not award a grant to the City of Los Angeles for construction of the project until the public has had a further opportunity to comment on the environmental impact of the project. I have, therefore, directed that no action should be taken on the grant application submitted by the City of Los Angeles for the Hyperion Interim Sludge Project until the requirements of the National Environmental Policy Act have been satisfied with respect to the EIR/EIS for the City of Los Angeles Wastewater Facilities Plan.

PAUL DE FALCO, JR.
Paul De Falco, Jr.

Subscribed and sworn to before me this
18th day of April, 1977.

(SEAL)

MELINDA TAPLIN
Notary Public

My commission expires July 6, 1980.

APPENDIX B

(Letterhead of Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Telephone (916) 444-0154)

June 10, 1977

Mr. William H. Pierce, Chief
Permits Branch Enforcement Division
United States Environmental
Protection Agency
100 California Street
San Francisco, CA 94111

Dear Mr. Pierce:

In re: Hyperion Treatment Plant, Los Angeles, California, Interim Sludge Processing and Disposal System Extension of Expiration Date for NPDES Permit No. CA0109991, Reference: E-4-1 869.2D

This is a request pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552.

We have attempted through telephone conversations with Environmental Protection Agency Region IX offices to find out whether the extension has been approved and, if so, on what date. Thus far, we have not been given a response.

In accord with the provisions of the Freedom of Information Act, please furnish us with the following:

1. The date of issuance of the Environmental Protection Agency extension of the expiration date to December 17, 1979, of NPDES Permit No. CA0109991.

2. The official document of the Environmental Protection Agency which establishes the extended expiration date of the permit.

3. All supporting documents and materials which form the basis for the decision to extend the expiration date of NPDES Permit No. CA0109991 from June 30, 1977, to December 17, 1979.

Pacific Legal Foundation is a nonprofit, tax-exempt law firm serving the public interest. We therefore request that in accordance with the provisions of the Freedom of Information Act any fees be waived, as the information is requested primarily to benefit the public.

Very truly yours,

DAVID M. SHELL
Law Clerk

Supreme Court, U. S.
FILED
MAY 22 1979
MICHAEL RODAK, JR., CLE

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978

No. 78-1472

DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency,

Petitioner,

v.

PACIFIC LEGAL FOUNDATION; JOHN B. KILROY, SR.; THE CITY OF TORRANCE; and THE CITY OF LOS ANGELES,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE CITY OF LOS ANGELES

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---

BRIEF IN OPPOSITION FOR RESPONDENT THE CITY OF LOS ANGELES

STATEMENT

Respondent City of Los Angeles ("City" hereinafter) accepts the statement of facts set forth in the petition filed herein, as corrected and supplemented by the opposition brief filed by respondents Pacific Legal Foundation and John B. Kilroy, Sr., but submits the following corrections and additions

of its own.

A. Permitting History of the Hyperion Treatment Plant Outfalls

Altogether, discharges from the outfalls extending into the ocean from the City's Hyperion Treatment Plant have been regulated by nine discharge permits issued over approximately the past five years: five issued by the California Regional Water Quality Control Board, Los Angeles Region ("CRWQCB" hereinafter) acting alone but without rejection of such issuance by the United States Environmental Protection Agency ("EPA" hereinafter); one, the action in question, by the EPA acting alone; and three by the CRWQCB and the EPA acting jointly.

1. CRWQCB Order No. 74-329, EPA NPDES Permit No. CA 0109991 1/ (effective 12-18-74) 2/

1/ The EPA regulates the Hyperion discharges by means of National Pollutant Discharge Elimination System ("NPDES") "permits" whereas the CRWQCB regulates through "orders." The EPA has chosen to regard its permitting activities at Hyperion as involving a single permit, to which the City

This jointly issued permit was the first and dealt exclusively with the five-mile (treated effluent) and one-mile (emergency) outfalls. The seven-mile sludge outfall was not regulated. 74-329 contained an expiration date of June 1, 1977.

2. CRWQCB Order No. 75-100, NPDES Permit No. CA 0109991 (effective 9-17-75) 3/

---

takes exception, and has ascribed but one number to such permit, CA 0109991. Conversely, each CRWQCB order is apparently regarded as having a separate identity as each has its own number. For convenience of expression, all such actions regarding the Hyperion outfalls will be referred to hereinafter as permits.

2/ A certified copy of this permit was Exhibit 1 to the City's opening brief below and was part of the augmented record below.

3/ This permit is item number 1 in the Administrative Record certified to the court below by the EPA ("AR" hereinafter).

This jointly issued permit rescinded 74-329 and regulated all three outfalls. 75-100 introduced a three-phase sludge-out schedule, each phase providing for the discontinuance of one-third of the sludge discharge. The deadline for the completion of each phase was stated in terms of months after the date of "concept approval." Thus, the sludge discharge was to end altogether with the completion of the third phase within "30 months from date of concep. approval." AR 16. 75-100 contained an expiration date of February 1, 1977.

3. CRWQCB Order No. 75-165 (effective 12-1-75) 4/

This permit, issued by the CRWQCB alone and without veto by the EPA, recited that 75-100 and the NPDES permit contained a sludge-out schedule "related" to concept approval, that concept approval was given on October 1, 1975,5/ and

4/ A certified copy of this permit was Exhibit 2 to the City's opening brief in the court below.

5/ Conditional concept approval was given by the State on such date.

that the EPA was "administratively modifying" the NPDES permit to "substitute definite dates in the time schedule for compliance with the sludge discharge prohibition." Based on the date of concept approval, 75-165 supplied the dates for the three phases of the sludge-out schedule which in 75-100 had been keyed to months after concept approval. The date for completion of the third phase was given as April 1, 1978. 75-100 was otherwise left unchanged.

4. CRWQCB Order No. 76-80 (effective 5-24-76) 6/

This permit, issued by the CRWQCB alone and without veto by the EPA, changed the sludge-out schedule from three phases to four over a longer period. The date for complete sludge-out, for example, was extended from April 1, 1978 to April 1, 1980. The City does not concede that concept approval was then or at any other time given by the EPA.

6/ A certified copy of this permit was Exhibit 3 to the City's opening brief in the court below.

5. CRWQCB Order No. 76-202 (effective 11-22-76) 7/

This permit, issued by the CRWQCB alone and without veto by the EPA, amended 76-80 to adjust deadlines for the submission of certain plans and specifications and the award of certain contracts. 76-80 was left intact in all other respects.

6. CRWQCB Order No. 77-1, NPDES Permit No. CA 0109991 (effective 1-24-77 [CRWQCB], 2-23-77 [EPA]) 8/

This jointly issued permit expressly found that the CRWQCB adopted 75-165, 76-80, and 76-202 "amending the time schedules contained in Order No. 75-100." AR 120. 77-1 extended the expiration date of 75-100 from February 1, 1977 to June 30, 1977, 75-100 remaining effective in all other respects. AR 121.

7/ A certified copy of this permit was Exhibit 4 to the City's opening brief below.

8/ This permit is item number 7 in the AR.

7. CRWQCB Order No. 77-29 (effective 2-28-77) 9/

This permit, issued by the CRWQCB alone and without veto by the EPA, amended 76-80's sludge-out schedule by modifying a provision relating to trucks. 76-202 was rescinded. 76-80 was in all other respects left intact.

8. CRWQCB Order No. 77-84 (effective 6-2-77) 10/

This permit, issued by the CRWQCB alone and without veto by the EPA, found that 75-100 had been amended by 75-165 and 77-1 (making no reference to 76-80 and 76-202), and noted 75-100's expiration date of June 30, 1977. AR 145. 77-84 further found that the EPA was "administratively modifying the expiration date of the NPDES Permit to extend the permit to the full five-year statutory length as provided in the Federal Water Pollution Control

9/ A certified copy of this permit was Exhibit 5 to the City's opening brief in the court below.

10/ This permit is item number 16 in the AR.

Act and has requested that Order No. 75-100 be extended for the same period." Id. 77-84 provided that it was to "serve as part of" an NPDES permit in the absence of objections by the EPA Regional Administrator. AR 146. 77-84 rescinded 77-1, extended the expiration date of 75-100 to December 17, 1979, and left 75-100 intact in all other respects. Id.

The letter advising the City of the CRWQCB's proposed action, which became 77-84, stated that the CRWQCB "will consider extending the expiration date of Order No. 75-100 (NPDES Permit No. CA 0109991) to December 17, 1979," AR 133, and the attached tentative order was in all material respects identical to that adopted as 77-84. See AR 135-136.

9. NPDES Permit No. CA 0109991 (effective 6-2-77)

By a letter of June 2, 1977 11/ the EPA extended the expiration date of

11/ This letter is item number 15 in the AR.

NPDES Permit No. CA 0109991 from June 30, 1977 to December 17, 1979.

The City was advised of proposed modifications to NPDES Permit No. CA 0109991, which became the June 2, 1977 extension, by a letter of April 26, 1977, 12/ which letter did not describe the proposed modifications but enclosed a copy of the "public notice" relating thereto. AR 128. The public notice's 13/ sole description of the proposed modifications was that the "Regional Administrator proposes to extend the expiration date of the permit from June 30, 1977 to December 17, 1979. All other terms and conditions of the permit would remain unchanged." AR 130.

B. The EPA Enforcement Action

On August 12, 1977, less than two months after its most recent permitting action, the EPA caused an enforcement action to be filed in federal district

12/ This letter is item number 9 in the AR.

13/ This notice is item number 10 in the AR.

court 14/ under Clean Water Act section 309 [33 U.S.C. § 1319] which alleged, among other things, violation of NPDES Permit No. CA 0109991 by virtue of the City's alleged failure to meet certain deadlines in the three-phase sludge-out schedule of 75-100 and which sought civil penalties therefor and an injunction imposing the four-phase sludge out schedule of 76-80 but without reference to 76-80. The complaint filed in the case did not refer to the existence of any CRWQCB permitting action, although it did attach, as an exhibit, 75-100, a jointly issued permit.

14/ United States of America v. City of Los Angeles, et al., No. CV 77-3047-HP (C.D. Cal.) A certified copy of the complaint, sans exhibits, was filed with the court below as Exhibit A to the City's Memorandum in Reply to Motion for Clarification of Order.

REASONS FOR DENYING THE WRIT

A. Where Concurrent Permitting Jurisdiction Exists, the EPA Bears a Heavy Burden of Justifying a Decision Not to Hold a Hearing, which Burden was Not Borne by the EPA in this Case

1. Concurrent Jurisdiction was Required by the Court Below

In its petition for review the City sought to establish exclusive state jurisdiction over all three of the Hyperion outfalls, but also sought, alternatively, to establish exclusive federal jurisdiction in the absence of state jurisdiction. See City's opening brief in the court below, at 28-30. The court below ruled, however, that the EPA has jurisdiction over the five and seven-mile outfalls while the State of California has jurisdiction over the one-mile emergency outfall. 15/

15/ The court expressly avoided addressing the question of the extent to which or the circumstances under which the state would have jurisdiction over the five and seven-mile outfalls. Pacific Legal Foundation v. Costle, 586 F.2d 650, 657.

Pacific Legal Foundation v. Costle, 586 F.2d 650, 657. None of the parties before this Court now takes issue with this holding.

2. Coordination is Imperative

The court stated that joint action was the "most sensible way of dealing with the problems created by this splitting of jurisdiction," id., while recognizing the "problems involved in coordinated action." Id. The court cautioned that coordination was "imperative." Id. None of the parties before this Court now takes issue with this ruling.

In concluding that it could not find that an adjudicatory hearing prior to the June 2, 1977 extension would have served "absolutely no purpose", id., at 659, the court cited "special circumstances" in this case which cautioned against concluding that no dispute existed over material facts. Id. The court noted:

> "Among the special circumstances of this case is the division of jurisdiction over discharges in the ocean between the federal and state authorities which significantly complicates compliance by an affected agency. It becomes

> both possible and tempting for each authority to deny responsibility by attributing the command in question to the other. The ease with which this can be done increases as the opportunities for confrontation in a hearing setting diminish. Considerations such as these may properly influence our decision about whether a hearing in the situation before us would be useless." (Emphasis added.) Id.,at 659-660.

The record supports the observations of the court below. The EPA evidently believed that it was free to adopt those actions by the state authorities which served its purposes. Thus, in its enforcement action it adopted the state's granting of "concept approval" on October 1, 1975, so as to trigger the three-phase sludge out schedule of 75-100. Yet it chose to ignore almost entirely 16/ the four-phase sludge out schedule of 76-80 which modified 75-100's sludge-out deadlines (e.g., the date for total sludge-out was extended by two years). 76-80 was neither vetoed by the EPA,

16/ To be sure, 77-1, a joint permit, did refer to 76-80 as amending 75-100's time schedules.

which the EPA had the right to do under Clean Water Act section 402(d)(2) [33 U.S.C. § 1342(d)(2)], nor rescinded by a later permitting action.

3. A Hearing May Be Essential

If the objective of the June 2, 1977 extensions was to restore the three-phase sludge-out schedule of 75-100 (the enforcement action predicated on that schedule was filed shortly thereafter), this was not made clear by the notices given to the City. The letters from both the EPA and CRWQCB conveyed the sole message that NPDES Permit No. CA 0109991 and 75-100 would be extended to December 17, 1979. As noted by the court below, 586 F.2d at 660, the record is "barren of any explanation of the extension of June 2, 1977." Had a hearing been held, the intentions of the EPA and CRWQCB presumably would have been made clear to the City, something that the notices sent to the City failed to do. To this extent, the "opportunity for public hearing" mandated by Clean Water Act section 402(a)(1) [33 U.S.C.

§ 1342(a)(1)] is not meaningful with respect to the issuance of a discharge permit if the full ramifications of the proposed action are not explained to the intended permittee.

This Court's dictum in National Independent Coal Operators Association v. Kleppe, 423 U.S. 388, 398 (1976), interpreting a different statute's establishment of an "opportunity for a public hearing" as a prerequisite to the assessment of a civil penalty as creating only the right to request a hearing, may be distinguished on the ground that in that case the impact of the imposition of a civil penalty was clearer than that of the extension at issue herein. Underlying reasons aside, civil penalties may generally be perceived as being harsh, but not as being complicated. NPDES permits, however, can be extremely complicated and, judging from the record in this case, ambiguous and confusing as well.

This difference is ample cause to distinguish the National Coal Operators dictum and to place upon the EPA the

burden of justifying a decision not to conduct an adjudicatory hearing relative to a permit issuance. The confrontation inherent in such a hearing will not only bring to light differences over facts material to the proposed action, but will also foster coordination between the federal and state authorities.

B. Requiring the EPA to Justify not Holding a Hearing in Cases Involving Concurrent Jurisdiction will not be a Heavy Administrative Burden

So far as the City is aware, it is one of but two dischargers having outfalls extending both less than and more than three miles from shore. (The EPA is, of course, in a much better position to know whether this is so.) Hence, these outfalls may be the only ones subject to concurrent regulation. Therefore, requiring the EPA to justify a decision not to hold a hearing prior to the issuance of a permit where concurrent regulation is involved should not unduly affect the execution of its administrative responsibilities.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari does not raise issues of sufficient importance to warrant review of the decision below by this Court.

Respectfully submitted,

BURT PINES, City Attorney
THOMAS C. BONAVENTURA, Sr.
Assistant City Attorney
SALLY DISCO,
Assistant City Attorney
FREDERICK N. MERKIN,
Deputy City Attorney

Attorneys for Respondent
The City of Los Angeles

May 1979

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JUN 7

Supreme Court, U. S.
FILED
MAY 31 1979
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No. 78-1472

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

PACIFIC LEGAL FOUNDATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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REPLY MEMORANDUM FOR PETITIONER

---

1. The essence of this case is that the Environmental Protection Agency issued regulations stating the conditions under which it would hold an APA-type adjudicatory hearing before issuing, denying, modifying, or revoking a National Pollutant Discharge Elimination System permit. Respondent Kil-

roy requested an "adjudicatory hearing" but failed to satisfy a prerequisite for such a hearing under the regulations—he did not identify any material issue of fact as to which an evidentiary hearing was appropriate. EPA, therefore, did not hold such a hearing. Notwithstanding Kilroy's failure to satisfy this administrative requirement, the court of appeals held that Kilroy was denied an "opportunity for public hearing" within the meaning of Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1). The court held that EPA must routinely hold adjudicatory hearings when NPDES permits are issued, denied, revoked or modified—even in the absence of a request for a hearing—except when such hearings would be "futile," and that EPA may not limit adjudicatory hearings to those circumstances defined in its regulations.

The issue presented in this case, therefore, is whether EPA's regulations (40 C.F.R. Part 125) provide a sufficient "opportunity for public hearing" within the meaning of Section 402(a)(1) of the Act, 33 U.S.C. 1342(a)(1). As set forth in more detail in our petition (at pages 3-4), those regulations provide for three types of "hearings": (1) a "legislative-type" hearing at which interested persons may submit information and comments to the agency, 40 C.F.R. 125.34; (2) an "adjudicatory" hearing for the trial-type determination of "material issues of fact relevant to the questions of whether a permit should be issued, denied or modified," 40 C.F.R. 125.36(b), (c); and (3) a procedure for the submission to and

determination by the agency of any issue of law concerning the issuance, revocation, denial or modification of permits. 40 C.F.R. 125.36(m).

Each type of hearing has its own prerequisites. A legislative-type hearing is required only when the regional administrator finds that there is enough public interest in the proposed action, after public notice, to warrant such a hearing, 40 C.F.R. 125.34. An adjudicatory hearing is required only if an interested party presents a request for an adjudicatory hearing which states with particularity the reasons for the request and the factual issues to be considered (40 C.F.R. 125.36(b)(1), (b)(2)), and the regional administrator determines that the request "[s]ets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." 40 C.F.R. 125.36(c)(1)(ii). Determinations of issues of law are made only upon request by an interested party who sets forth the legal ground for objection to the agency actions. 40 C.F.R. 125.36(m).

In the present case, the agency determined, after public notice, that a legislative-type hearing was not warranted. The agency held no adjudicatory hearing because no one tendered a request presenting material issues of fact. Kilroy filed a "request for an adjudicatory hearing" but the only two issues raised were questions of law, not of fact. The agency considered the issues and resolved them on the merits against Kilroy. The court of appeals did not disturb EPA's decision not to hold a legislative-type hearing.

Neither did it question EPA's resolution of the issues of law tendered by Kilroy.

This holding, as explained in our petition (at pages 13 to 16), conflicts with *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 397-398 (1976). There, the Court held that a statutory "opportunity for hearing" does not require an "automatic" hearing. The hearing may be keyed to a request. The Court has also held that an agency may establish reasonable prerequisites for granting a hearing and "barring at the threshold those who [do not] measure up to them." *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964); *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Ass'n*, 356 U.S. 282, 287 (1958); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). The requirement that parties file requests setting forth material factual issues is a reasonable prerequisite to granting an adjudicatory hearing. A rule mandating routine adjudicatory hearings, as we have explained, would impose an undue burden on the agency (Pet. 16-17).

2. Respondents Kilroy and Pacific Legal Foundation (PLF) contend that certiorari should be denied for several reasons, which deserve reply. They contend (PLF Br. 6-7)[1] that EPA failed to provide them with adequate notice of the proposed extension. They assert that "Kilroy did not see the notice published

[1] "PLF Br." refers to the brief in opposition filed by PLF and Kilroy.

in the *Los Angeles Times*" and "neither PLF nor Kilroy received actual notice of the proposed action."[2] The adequacy of the newspaper notice, however, is not presented by the circumstances of this case. That issue would arise only if the court of appeals had remanded for a legislative-type hearing on the theory that the public had not been given sufficient warning of EPA's proposed extension of the permit. Respondents had sufficient notice to make a request for an adjudicatory hearing and they in fact did so, although the request was limited to legal issues. That the request was made and that EPA considered it on its merits eliminate any issue concerning the sufficiency of the notice for purposes of this case.[3]

3. Respondents also contend (PLF Br. 8-9) that Kilroy's request posed more than issues of law and also presented the factual issue whether the " 'record developed' " was inadequate to issue the permit. Aside from the fact that respondents do not, even now, identify specific factual deficiencies in the record, it is all too plain that the request raised only two issues of law. Kilroy's original request tendered two "issues to be raised." One of these concerned whether

[2] Respondents carefully avoid stating that PLF did not see the newspaper notice. We assume for purposes of argument only that PLF did not see the newspaper notice.

[3] For the same reason, it is immaterial that respondents had "to file a Freedom of Information Act request" to determine the status of the extension proceedings (PLF Br. 6). Whatever information respondents lacked was cured by the time the request for an adjudicatory hearing was made.

it was proper to extend the permit while an environmental impact statement was in preparation for EPA's decision to fund the interim sludge project (Pet. App. 26a). This is a legal matter.

The other issue was phrased as "whether the procedures used and the record developed were adequate [for the] issuance of an NPDES permit." This, however, was but a restatement of respondent's contention that the action taken was an "issuance" rather than an "extension" of a permit.[4] Any doubt on this score was eliminated when Kilroy, represented by PLF, restated the two issues that he desired to raise (Pet. App. 31a-32a):

> Requestor of the adjudicatory hearing, John B. Kilroy, proposed to raise two basic issues:
>
> 1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and
>
> 2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332 *et seq.*, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1281, *et seq.*

[4] The request also stated that a "reason for the request" was because "the procedures for *issuance* of an NPDES permit pursuant to 40 CFR Section 125.2 *et seq.* were not followed, there are no provisions in the regulations for the extension of the expiration of an NPDES permit" (Pet. App. 26a; emphasis added).

Neither of these issues poses any factual question. Under these circumstances, the regional administrator properly determined that the request raised only legal issues.[5]

4. For similar reasons, respondents' attempt to distinguish *Kleppe* (PLF Br. 4) is unconvincing. First, respondents note that in *Kleppe*, the coal operators had actual notice from the agency of the proposed assessment, whereas EPA used "constructive

[5] In a related attempt to excuse their failure to raise material issues of fact, respondents argue (PLF Br. 8-9) that "EPA was well aware that PLF and Kilroy had substantial concerns about the environmental impact of the actions required in the permit" because in another lawsuit EPA had agreed that it and the City of Los Angeles would prepare an environmental impact statement concerning EPA's decision to fund the Hyperion Interim Sludge Project. Any such general "awareness," however, is no substitute for a specific request by respondents identifying concrete factual issues that deserve resolution, as required by 40 C.F.R. 125.36(b)(2). EPA was not required to speculate concerning whether respondents desired to have unspecified factual issues resolved as well as the legal issues they tendered. To the contrary, EPA was justified in concluding that the respondents' contentions in related litigation were adequately reflected in the legal issue, posed by Kilroy in this request, whether the ongoing preparation of the EIS required a postponement of any decision to extend the permit. See *Pacific Legal Foundation* v. *Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977), appeal pending, No. 77-3844 (9th Cir.) (treating dispute between PLF and agency as one of law).

notice" in the form of a newspaper advertisement. As explained above, however, this difference is wholly immaterial since Kilroy had sufficient actual notice to file "a request for an adjudicatory hearing" and EPA determined the issues raised on the merits. Any deficiencies in the newspaper notice cannot excuse respondents' failure to include factual issues among the issues raised in the request.

Second, they contend (PLF Br. 4) that *Kleppe* is different because, there, the regulations expressly provided that the failure to request a hearing would constitute a waiver of the hearing, whereas EPA's regulations do not contain a similar provision. This distinction vanishes upon even a casual reading of EPA's regulations which provide that "if the Regional Administrator determines that the request fails to meet the requirements of [the provisions which require material issues of fact to be specifically identified] *he shall deny the request*" (emphasis added). 40 C.F.R. 125.36(c)(2).

Third, respondents contend (PLF Br. 4) that the coal operators in *Kleppe* failed to file a timely request, whereas Kilroy did but the request was "denied" anyway. EPA, however, denied Kilroy's request on the merits—by ruling against his legal objections. EPA did not deny the request for untimeliness.

Fourth, in a similar vein, respondents argue (*id.* at 4-5) that no request at all was filed in *Kleppe*, whereas respondent Kilroy did make a request in this case but it was "denied." EPA's "denial" of an evidentiary hearing, however, was due wholly to Kilroy's failure to specify a material issue of fact, as

required by the regulations. In sum, *Kleppe* holds that a statutory opportunity for a hearing may be keyed to request. There is no reason to adopt a different rule under Section 402(a)(1).

5. Respondents argue (PLF Br. 10-11) that we have exaggerated the burden of the court of appeals' decision. Respondents concede, as they must, however, that the "effect of the decision of the court of appeals is to require that EPA support a refusal to provide an adjudicatory hearing with a record which demonstrates 'that the material facts supporting the decision are not subject to dispute'" (*id.* at 10-11). This is severe enough, for it permits any interested party to do nothing more than make a bare request for an adjudicatory hearing without specifying the material issues of fact which require resolution; if the bare request is denied, the agency must show on judicial review that no genuine dispute exists over any fact that "supports" the decision.

But the court's opinion goes further. It also requires an adjudicatory hearing—even when no request is made—unless the agency can show that a hearing would be "futile" or "serve absolutely no purpose" (Pet. App. 20a). The court stated (*id.* at 18a-20a):

> The Administrator misconceives the showing that must be made to demonstrate that adequate opportunity for a hearing has been given. The necessity for a hearing turns not only on the vigor with which interested parties clamor for one, but also on whether a showing has been made demonstrating that a hearing is unnecessary.
>
> * * * * *

> The fact that no one requested a hearing prior to the decision is appropriately considered in this analysis, but it is not decisive. It must be shown that the material facts supporting the decision are not subject to dispute. We realize that this is a not inconsiderable burden to place on the agency, but it is appropriate in view of the strong policy in favor of holding public hearings before an adjudicative decision is made.

Respondents argue (PLF Br. 11) that the requirement that hearings be held routinely is no more burdensome than the agency's regulations which already require a public hearing, even in the absence of a specific request, where the agency finds "significant public interest" in the proposed action. See 40 C.F.R. 105.7(c) and 125.34(a). These provisions, however, apply only to legislative-type hearings, not adjudicatory hearings. Adjudicatory hearings, in contrast, are required under the regulations only when specific requests presenting material issues of fact are filed ~~and otherwise denied.~~ See 40 C.F.R. 125.36.

In sum, the requirement that the agency routinely conduct adjudicatory hearings[6] for every issuance, revocation, denial or modification of an NPDES permit (except in the rare case where such a hearing would serve "absolutely no purpose") will severely

[6] The court of appeals repeatedly stated that EPA was required to hold an adjudicatory, fact-finding, evidentiary, trial-type proceeding with all the protections of the Administrative Procedure Act, 5 U.S.C. 554, 556-557 (see Pet. App. 17a, 18a, 20a & n.4, 22a).

disrupt the NPDES program and erroneously divert scarce agency resources to what, in most cases, will be an unilluminating and time-consuming waste.[7]

For these reasons, as well as those set forth in our petition, we respectfully submit that the petition for certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

[7] Respondent City of Los Angeles essentially contends (Br. for Resp. 14) that, had it been aware of the terms and conditions of its 1975 permit, it would have requested an adjudicatory hearings. Respondent acknowledges that it must satisfy independently both the federal and the state discharge requirements but claims that it believed the federal compliance schedule was changed in 1976 by a joint EPA-state permit to conform to the more lenient state schedule (Br. for Resp. 6). The joint permit only stated, however, that the state compliance schedule had been modified. It extended the 1975 federal permit without modification of the federal schedule. The 1977 notice stated that EPA proposed to extend its own 1975 permit without other modification. No reasonable basis existed for believing the federal compliance schedule had been altered. If there was any basis for confusion, respondent took no action to clear it up before allowing EPA to proceed to extend the 1975 permit. In any event, the court of appeals did not rely on any confusion concerning the precise dates of the compliance schedule in ruling that EPA must routinely hold adjudicatory hearings.

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No. 78-1472

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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Los Angeles Times, April 27, 1977 — 12

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1472

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court of appeals is reported at 586 F.2d 650.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1978. The government's timely petition for rehearing with suggestion of rehearing en banc was denied on November 24, 1978. By order dated February 12, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari on March 23, 1979, and the petition was filed on that date. The petition was granted on June 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), which requires the Environmental Protection Agency to provide "opportunity for public hearing" prior to any issuance, denial, or modification of a discharge permit, requires EPA to conduct APA-type adjudicatory hearings before taking action on such permits where, after due notice of the proposed action, the only request for a hearing raises no material issue of fact.

STATUTES AND REGULATIONS INVOLVED

1. Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), provides in part as follows:

> [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants * * *.

2. Sections 125.32, 125.34, and 125.36 of Title 40, Code of Federal Regulations, as promulgated by the Environmental Protection Agency on July 24, 1974, state in part as follows (39 Fed. Reg. 27079):[1]

> § 125.32 Public notice.
>
> (a) Public notice of the proposed issuance, denial or modification of every permit or denial shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny, or modify a permit for the discharge. * * * Procedures for the circulation of public notice shall include at least the following:
>
> (1) Notice shall be circulated within the geographical area of the proposed discharge; such circulation shall include any one of the following:
>
> * * * * *
>
> (iii) Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation.
>
> (2) Notice shall be mailed to the applicant, Federal and State fish, shellfish and wildlife resource agencies, and other appropriate government agencies, and to any person or group upon request and shall provide an opportunity to submit their written views and recommendations on each proposed issuance.
>
> * * * * *
>
> § 125.34 Public hearings.
>
> (a) Except as provided in paragraph (d) of this section, where the Regional Administrator finds a significant degree of public interest in a proposed permit or group of permits, he shall hold a public hearing to consider such permit or permits.
>
> * * * * *
>
> § 125.36 Adjudicatory hearings.
>
> * * * * *
>
> (b) *Requests for adjudicatory hearings and legal decisions.* (1) Within 10 days following the date of determination with regard to a per-

[1] These regulations have since been revised, but none of the revisions affects any of the matters at issue here. See 44 Fed. Reg. 32854 (June 7, 1979) and note 5, *infra*.

mit pursuant to § 125.35(a) or any modification thereto, any interested person may submit to the Regional Administrator a request for an adjudicatory hearing pursuant to paragraph (b)(2) of this section or a legal decision pursuant to paragraph (m) of this section, to reconsider the determination with regard to a permit and the conditions contained therein.

(2) Requests for an adjudicatory hearing shall:

* * * * *

(v) State with particularity the reasons for the request;

(vi) State with particularity the issues proposed to be considered at the hearing; and

(vii) Include proposed terms and conditions which, in the judgment of the requestor, would be required to carry out the intendment of the Act.

(c) *Decision on a request for a hearing.* (1) Within ten (10) days following the expiration of the time allowed by paragraph (b) of this section for submitting a request for an adjudicatory hearing, the Regional Administrator shall grant the request and shall promptly assign the matter for hearing if he determines that a submitted request:

(i) Meets the requirements of paragraph (b) of this section and,

(ii) Sets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified.

(2) If the Regional Administrator determines that the request fails to meet the requirements of paragraph (c)(1) of this section, he shall deny the request.

* * * * *

(m) *Decision of the Assistant Administrator for Enforcement and General Counsel on questions of law.* (1) Issues of law, including questions relating to the interpretation of provisions of the Act, and the legality and interpretation of regulations promulgated pursuant to the Act, shall be decided in accordance with this subsection and shall not be considered at the adjudicatory hearing.

* * * * *

(2) The Presiding Officer shall determine which issues, if any, submitted by the parties fall into the category specified in paragraph (m)(1) of this section, and shall refer such issues to the Assistant Administrator for Enforcement and General Counsel for resolution. Such referral may be accompanied by briefs, filed with the Assistant Administrator for Enforcement and General Counsel within twenty (20) days of the removal of the referred issues from the adjudicatory hearing by the Presiding Officer pursuant to paragraph (m)(2) of this section. * * *

* * * * *

(3) Where no adjudicatory hearing has been granted, issues of law may be referred by the Regional Administrator to the Assistant Administrator for Enforcement and General Counsel for a decision in the manner specified in paragraph (m)(2) of this section.

(4) The Assistant Administrator for Enforcement and General Counsel shall provide the Regional Administrator, the Presiding Officer, where appropriate, and each party with a written decision with respect to each referred issue of law. A written opinion setting forth the

reasons and basis for the decision shall also be provided. The decision of the Assistant Administrator for Enforcement and General Counsel shall be final with respect to each referred issue of law as it relates to the particular permit in question and shall be relied upon by the Regional Administrator in rendering the initial decision.

STATEMENT

1. The Federal Clean Water Act (also known as the Federal Water Pollution Control Act),[2] 33 U.S.C. 1251 *et seq.*, establishes "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1). Section 301(a) of the Act, 33 U.S.C. 1311(a), makes unlawful the discharge of any pollutant into the navigable waters of the United States, the contiguous zone, or the ocean,[3] except in compliance with the specific requirements of the Act. One such requirement is to obtain a permit issued by the Administrator under Section 402 of the Act, 33 U.S.C. 1342 and adhere to its terms.

Section 402 establishes the National Pollutant Discharge Elimination System (NPDES). Section 402(a)(1) authorizes the Administrator, "after opportunity for public hearing," to issue a permit for the discharge of any pollutant, on the condition, among others, that the discharge will meet the requirements

[2] See 91 Stat. 1566.

[3] See the definitions in Section 502(7), (8), (9), (10), and (12) of the Act, 33 U.S.C. 1362(7), (8), (9), (10), and (12).

of Section 301(b) of the Act, 33 U.S.C. 1311(b). At all times material to this case, Section 301(b)(1)(B) required that no later than July 1, 1977, "publicly owned treatment works" meet "effluent limitations based upon secondary treatment" as defined by the Administrator (see 40 C.F.R. Part 133).[4]

In 1973 EPA promulgated regulations, 40 C.F.R. Part 125, implementing the "opportunity for public hearing" required by Section 402(a)(1).[5] The

[4] On October 18, 1977, Congress amended the Act to permit the Administrator to grant extensions of this deadline through, but no later than, July 1, 1983. Pub. L. No. 95-217, Section 45, 91 Stat. 1584 (33 U.S.C. 1311(i)). The amendment also permits the Administrator to modify the effluent limitations of Section 1311(b)(1)(B) with respect to discharges by publicly owned treatment works into marine waters. Section 44, 91 Stat. 1584 (33 U.S.C. 1311(h)). Although in September 1978 Los Angeles submitted to EPA a preliminary request for a waiver under Section 301(h), it has yet to submit a final request under the regulations implementing that statutory provision, which were published on June 15, 1979 (44 Fed. Reg. 34784). EPA's regulations regarding "effluent limitations based upon secondary treatment" appear at 40 C.F.R. Part 133. They are not at issue in this suit.

Section 402 requires that NPDES permitees who discharge into "the contiguous zone" meet certain additional "ocean discharge" criteria. See Section 402(a)(1). When the substantive permit terms were set, EPA had promulgated valid regulations defining these criteria. They were withdrawn for revision at the time of the permit extension at issue here, however. PLF argued below that EPA had no authority to impose any conditions on ocean discharges in the absence of such regulations. The court of appeals found against it on this point, on which no cross-petition was filed.

[5] EPA's NPDES regulations have been comprehensively amended since the events at issue here, but these amendments do not affect the present or future importance of the issues

regulations provide for three types of hearings. First, public notice is given of EPA's proposed issuance, denial, or modification of a permit and comments are solicited. 40 C.F.R. 125.32. If EPA's regional administrator finds that there is "a significant degree of public interest" in the proposed action, he must hold a public hearing of the "legislative" type (at which any interested person may submit oral or written statements and data). 40 C.F.R. 125.34. Second, after that hearing, if one is held (or, if not, after the notice), the regional administrator must determine what action to take with respect to the proposed permit. 40 C.F.R. 125.35. Within ten days after this determination, any interested person may request an adjudicatory hearing with respect to any "material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." 40 C.F.R. 125.36(b), (c)(i). A request for an adjudicatory hearing must state with particularity the reasons for the request and the issues proposed to be considered. 40 C.F.R. 125.36(b)(2). Third, any interested person may also request legal rulings by EPA's General Counsel with respect to the proposed action pursuant to 40 C.F.R. 125.36(m), under which hearing requests which raise only legal issues in effect are treated as requests for legal opinions.

Within 90 days after EPA makes a final determination, any interested person may obtain judicial review in the appropriate court of appeals of the Administrator's issuance, denial, or modification of a permit. 33 U.S.C. 1369(b)(1). Otherwise, the terms and conditions of the permit are not subject to judicial review. 33 U.S.C. 1369(b)(2).

2. Since 1960, sewage from Los Angeles has been processed at the Hyperion Wastewater Treatment Plant in Los Angeles and discharged into the Pacific Ocean. Most of the sewage has received only primary treatment. About one-third of the sewage has received additional secondary treatment. The metals

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involved in this case. These amendments retain the "material issue of fact" test for granting a hearing which is at issue here. See Section 124.75, 44 Fed. Reg. 32939 (1979). Evidentiary proceedings will therefore still be denied where (or to the extent that) no factual issues are raised, see 44 Fed. Reg. 32887 (1979). Concerning legal objections to proposed permits, the regulations specifically provide that where the regional administrator denies a hearing, he must state the reasons, see Section 124.75(d), that this denial may then be appealed to the Administrator, that the administrator may review and change "policy or legal conclusions" on which the regional administrator relied in deciding not to grant a hearing, see Section 124.101(a)(3), 44 Fed. Reg. 32944 (1979), and that the General Counsel's office shall have lead responsibility for deciding these legal issues, see Section 124.101(e).

Beyond this preservation of the essentials of the previous regulations at issue here, the new regulations go further than the old in adapting the traditional form of evidentiary hearing to better fit with EPA's experience. They now require points to be raised at the "notice-and-comment," informal stage of permit issuance before they may be raised at an evidentiary hearing, see Section 124.76, 44 Fed. Reg. 32884-32885, 32939-32940 (1979), provide for automatic admission in the evidence at the "evidentiary" stage of the process of the "administrative record" of the earlier, informal, proceedings, see Section 124.85(d)(2), 44 Fed. Reg. 32885, 32942 (1979), and, most significantly, establish new, less formal hearing procedures for "initial licensing," see 44 Fed. Reg. 32887-32892, 32944-32947 (1979).

and other solids removed during treatment, called "sludge," have been pumped through a seven-mile outfall pipe and discharged into the Pacific Ocean. The treated sewage has been discharged into the ocean through a five-mile outfall. A one-mile outfall has been used only in emergencies. (See Pet. App. 3a-6a).

In November 1974 EPA issued to respondent City of Los Angeles a permit to discharge treated sewage from its Hyperion treatment plant into the Pacific Ocean.[6] EPA published notice of its intent to issue

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[6] Section 402(b) provides that the responsibility for issuing NPDES permits for discharges into navigable waters may be assumed by a state if it has an approved program, as California does. See generally *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202-209 (1976). A federal permit is still required for discharges more than three miles from the coastline. Therefore, EPA permits are required for Hyperion's discharges through its five- and seven-mile outfalls. The California Water Quality Control Board also requires a state permit for these outfalls under a state water pollution statute. Cal. Water Code § 13260 (West 1971).

Altogether there have been twelve actions by federal and state authorities affecting the Hyperion discharge permit—four by EPA and eight by the California Regional Water Quality Control Board (the Board). All four of the federal actions were taken jointly with four of the state actions. On November 18, 1974, a permit which covered the one- and five-mile outfalls, but not the seven-mile sludge outfall, was issued jointly by EPA and the State (Board Order No. 74-329) (see Pet. App. 4a). On August 18, 1975, the 1974 permit was rescinded by the two authorities and was replaced by a joint permit which included the requirement of a gradual elimination of the secondary sludge discharge from the seven-mile outfall (Board Order No. 75-100) (App.

the permit, provided an opportunity to submit written comments, and held a public hearing on its action. (*Id.* at 4a.)

On August 18, 1975, EPA rescinded the 1974 permit and issued a new permit with a compliance schedule that gradually reduced the amount of sewage sludge which could be discharged from the Hyperion plant (A. 3-50).[7] EPA published advance public notice of its tentative determination to revise the permit and held a hearing on the proposed revisions

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3-50). On January 24, 1977, the two authorities extended the 1975 permit until June 30, 1977 (A. 93-95), and on June 2, 1977, they extended the expiration date of that same permit until December 17, 1979 (Board Order Nos. 77-1 and 77-84) (A. 149-156). (The federal permit has retained the same number, CA0109991, throughout.)

During this time the Board also issued four other orders which affected only the state's compliance schedule for the sludge management project. On December 1, 1975 (Order No. 75-165), the State substituted definite dates for the measured time periods in that compliance schedule (A. 51-53). On May 24, 1976 (Order No. 76-80), the compliance dates in the schedule were extended because the City had failed to meet the initial deadlines (A. 54-58). On November 22, 1976 (Order No. 76-202), the State again extended the compliance schedule because of delays by the City (A. 59-62). On February 28, 1977 (Order No. 77-29), a progress reporting requirement was added to the State permit (A. 102-107).

[7] The 1975 permit set target dates for eliminating the sludge in three phases: (a) elimination of no less than one-third of the sludge by April 1, 1977; (b) elimination of no less than an additional one-third by October 1, 1977, and (c) termination of the discharge of sludge by April 1978 (A. 18). This schedule would have resulted in compliance with Section 301 effluent limitations and Section 403 ocean-discharge criteria. 33 U.S.C. 1311, 1343.

(App. 6). None of the respondents presented either written or oral objections to the new permit or requested an adjudicatory hearing. No one sought judicial review of EPA's issuance of this permit, and 90 days thereafter its terms and conditions were no longer subject to judicial review. 33 U.S.C. 1369 (b)(2).

3. On April 26, 1977, EPA advised the City of Los Angeles that EPA proposed to modify the 1975 permit by extending its expiration date to December 17, 1979, without otherwise disturbing its terms and conditions (A. 115-120).[8] Public notice of EPA's proposed action, including an invitation to submit comments and to request a hearing, was published in the *Los Angeles Times*, April 27, 1977 (A. 117-120, 126-128).[9] Neither respondents nor anyone else filed written comments or requested a hearing, and no hearing was held (Pet. App. 6a). On June 2, 1977, EPA issued a final determination to extend the permit (A. 149-150).

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[8] Permits may be issued for any period up to five years. 33 U.S.C. 1342(b)(1)(B). The 1975 permit originally had an expiration date of February 1, 1977. On January 24, 1977, EPA extended the permit to June 30, 1977 (A. 93-95).

[9] In addition to requiring EPA to publish its notice in a newspaper of general circulation, 40 C.F.R. 125.32(a)(2) permits any person to request in advance that EPA send him individual notice of any proposed action within a designated state or geographical area. Respondents made no such request for individual notice of proposed actions concerning the Hyperion plant. The City of Los Angeles, as the permittee, received an individual notice (A. 115-120). The other respondents received no notice other than the published notice (A. 117-120, 126-128).

On June 13, 1977, respondent John B. Kilroy, Sr., represented by attorneys for respondent Pacific Legal Foundation (PLF), filed a timely "request for an adjudicatory hearing pursuant to 40 CFR Section 125.36" (A. 159-165). A hearing request was filed only by Kilroy, a resident of the Los Angeles area (PLF Pet. For Review 2). None of the other respondents—PLF, the City of Los Angeles, and the City of Torrance—made such a request. Kilroy's request automatically stayed the effectiveness of the permit modification pending disposition of the request. See 40 C.F.R. 125.35(d)(2).

The regional administrator determined that Kilroy's request raised only issues of law, which he certified to the EPA General Counsel in accordance with 40 C.F.R. 125.36(m) (A. 168-170).[10] Kilroy then submitted a brief to the General Counsel in support of his argument that the permit modification was defective as a matter of law (A. 173-180). His brief did not contend that he desired to raise anything other than the following issues of law (A. 173-174):

1. Whether there is authority under either the applicable statutes or regulations to extend

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[10] The request stated (A. 160) that the "issues to be raised" at the adjudicatory hearing would be (1) "whether the requirements of the permit should be modified in that the project that is the subject of the compliance schedule set forth in the NPDES permit * * * is being evaluated in an EIS and * * * [whether] the compliance schedule should not be mandated * * * until the EIS is completed," and (2) "whether the procedures used and the record developed were adequate [to issue] an NPDES permit."

the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and

2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1281, *et seq.*[11]

The General Counsel ruled (A. 194-199) that EPA may extend the expiration date of a permit through a modification. Section 402 permits may be issued for terms up to five years. As long as the total duration of the extended permit does not exceed five years, she reasoned, a modification may include a time extension. The General Counsel also held that the fact that an environmental impact statement was being prepared in connection with the funding

[11] Kilroy's brief made four arguments (A. 173-180): (1) EPA has no authority to extend the expiration date of a permit because it is authorized only to issue a new permit, (2) although the Act permits "modifications," a time extension is not a "modification," (3) the action taken by the regional administrator therefore was the issuance of a new permit, and (4) the permit contained a sludge-out schedule that was then under evaluation in an environmental impact statement in connection with the funding of the landfill, and no decision on the schedule should be made pending completion of the environmental impact statement.

of the landfill project did not preclude extension of the permit. The Act expressly provides that EPA's actions on permits (other than permits to industrial dischargers which are "new sources") are exempt from NEPA. 33 U.S.C. 1371(c).

4. A petition for review of the administrator's action was filed in the court of appeals by PLF, Kilroy, and the City of Torrance (No. 77-2909).[12] A similar petition was filed by the City of Los

[12] The present proceeding is the second of three proceedings PLF has brought against EPA regarding sludge disposal by the City of Los Angeles wherein it has sought to prevent the City of Los Angeles from using a landfill located in Palos Verdes for the disposal of sludge. The first lawsuit unsuccessfully sought to enjoin EPA from funding the landfill project on the theory, among others, that no environmental impact statement was prepared by EPA with respect to its decision to fund the project. EPA voluntarily agreed, however, to prepare such a statement. *Pacific Legal Foundation* v. *Quarles*, 440 F.Supp. 316 (C.D. Cal. 1977), appeal pending, No. 77-3844 (9th Cir.). PLF's third action (the instant one being the second) was filed in the district court in Los Angeles. *PLF* v. *Andrus*, Civ. No. C-78-3464 AAH (C.D. Cal., filed Sept. 7, 1978). It alleged, among other things, that diversion of sludge from the ocean to the landfill, allegedly due to the sludge-out schedule in the 1975 permit, violated the Endangered Species Act, 16 U.S.C. 1536, because gray whales feed on plankton, which feeds on the sludge; because brown pelicans feed on anchovies, which feed on plankton, which feed on the sludge; and because trucks going to and from the landfill kill the El Segundo Butterfly. On May 3, 1979, the district court entered an order granting PLF's motion for partial summary judgment and requiring, *inter alia*, that a hearing on the NPDES permit extension, at issue here, be extended to include considerations under the Endangered Species Act. The Government is appealing that ruling.

Angeles (No. 77-3008), and the petitions were consolidated (A. 1).

The court of appeals did not question that EPA had complied with its notice-and-hearing regulations (see 586 F.2d at 653-654). Neither did the court take issue with EPA's interpretation of Kilroy's hearing request as raising only legal issues, or with the ruling of EPA's General Counsel rejecting Kilroy's legal arguments (see *id.* at 654).

Nonetheless, the court held that EPA had denied petitioners an "opportunity for public hearing" within the meaning of Section 402(a)(1) (*id.* at 657-660). The court held that EPA, before it may issue, revoke, or modify an NPDES permit, generally must hold an adjudicatory hearing, even when no one has requested one. For EPA to escape this general rule in a particular case, "[i]t must be shown that the material facts supporting the decision are not subject to dispute" (*id.* at 658-659) and that a hearing would be "futile" and would serve "absolutely no purpose" (*id.* at 659). The court acknowledged that "this is a not inconsiderable burden to place on the agency," but considered it "appropriate in view of the strong policy in favor of holding public hearings before an adjudicative decision is made" (*ibid.*).

The court suggested that there were certain facts "that may be disputed and with respect to which the record in this case is silent" that would affect the reasonableness of the compliance schedule in the extended permit (*ibid.*). The court said it could "conclude unequivocally neither that the parties have

no dispute about these matters nor that they do" (*ibid.*). Consequently, the court was "unable to deny an adjudicatory hearing on the ground that none of the material facts upon which the EPA's decision rests are disputed" (*ibid.*). In remanding the proceeding to the administrator to conduct such a hearing, the court did not limit the remand to the factual issues it had suggested. Pending the disposition of the case on remand, the court continued its stay of the compliance schedule embodied in the extended NPDES permit for the Hyperion plant.[13]

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue presented in this case is whether EPA's regulations (40 C.F.R. Part 125) provide a sufficient "opportunity for public hearing" within the meaning of Section 402(a)(1) of the Act, 33 U.S.C. 1342(a)(1). Those regulations provide for three types of "hearings": (1) a "legislative-type" hearing at which interested persons may submit information and comments to the agency, 40 C.F.R. 125.34; (2)

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[13] The court also continued its stay (by orders dated December 23, 1977, and March 29, 1978) of EPA's separate enforcement action against the City of Los Angeles for alleged violations of that schedule. *United States* v. *City of Los Angeles*, No. 77-3047 HP (C.D. Cal., filed Aug. 12, 1977). The court of appeals stayed that action, despite the fact that the enforcement action involved violations of the Hyperion permit which predated any of the governmental actions at issue in this case (the latest of those dates being January 1, 1977). Thus, it involves enforcement of permit conditions which never were challenged under 33 U.S.C. 1369(b) (see A. 1, 2, 181-191).

an "adjudicatory" hearing for the trial-type determination of "material issues of fact relevant to the questions of whether a permit should be issued, denied or modified," 40 C.F.R. 125.36(b), (c)(ii); and (3) a procedure for the submission to and determination by the agency of any issue of law concerning the issuance, revocation, denial or modification of permits, 40 C.F.R. 125.36(m).

Each type of hearing has its own prerequisites. A legislative-type hearing is required only when the regional administrator finds that there is enough public interest in the proposed action, after public notice, to warrant such a hearing. 40 C.F.R. 125.34. An adjudicatory hearing is required only if an interested person presents a request for an adjudicatory hearing which states with particularity the reasons for the request and the factual issues to be considered (40 C.F.R. 125.36(b)(1), (b)(2)), and the regional administrator determines that the request presents material issues of fact concerning whether a permit should be issued, denied or modified. 40 C.F.R. 125.36(c)(1)(ii). Determinations of issues of law are made only upon request by an interested party who sets forth the legal ground for objection to the agency actions. 40 C.F.R. 125.36(m).

In the present case, EPA determined, after public notice, that a legislative-type hearing on its time extension of the Hyperion permit was not warranted. The agency held no adjudicatory hearing because no one tendered a request presenting material issues of fact. The only request for a hearing raised only

questions of law, not of fact. The agency considered the issues and resolved them on the merits. No other objection—factual or legal—was presented. The court of appeals did not question EPA's decision not to hold a legislative-type hearing or its resolution of the issues of law presented to it.

Accordingly, had the court of appeals confined its review to those issues tendered to the agency, it would have affirmed EPA's extension of the Hyperion permit. Instead, the court construed the phrase "opportunity for public hearing" to require an automatic adjudicatory hearing in virtually all instances —even when no one advances any factual issue material to the case. Where the agency does not hold such a hearing, any person—even a stranger to the administrative proceedings—may, under the decision below, successfully set aside the administrative action by plausibly suggesting in the court of appeals that an adjudicative hearing could have uncovered a material issue of fact.

This holding was error. First, absent constitutional or specific statutory constraints, agencies are "free to fashion their own rules of procedure * * *." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Accordingly, even when a statute calls with seemingly unequivocation for a "full hearing" before denial of a license, the agency may condition such a hearing on filing an application that pleads facts that would warrant a license. *Denver Stock Yard* v. *Livestock Association*, 356 U.S. 282, 287 (1958); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204-

205 (1956). Otherwise, there might be a "vast proliferation of hearings" serving no purpose, a result Congress could not have intended. *FPC* v. *Texaco Inc.*, 377 U.S. 33, 39, 44 (1964). Where the statute merely calls for an "opportunity" for a hearing, it is all the clearer that the agency may impose reasonable threshold requirements. Specifically, the Court has held that a statutory "opportunity" for a hearing may be conditioned by an agency (i) on the submission of a request for a hearing, *National Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 398 (1976), and (ii) on the submission of a request or application that sets forth material issues of fact. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973). These holdings are dispositive here.

Second, nothing in the legislative history of the Act suggests that Congress intended to depart from these holdings or to preclude EPA's regulations. To the contrary, the only committee report to address Section 402's hearing provision stressed the word "opportunity." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1490 (1973) ("Leg. Hist."). Moreover, Congress clearly knew how to require a hearing in all instances when it wanted to. The pre-1977 Act elsewhere (Section 307(a)(2)) plainly stated that the administrator "shall" hold a hearing and the legislative history correspondingly recognized that a hearing was "required." *Id.* at 312. Section 402 significantly avoids such mandatory language. Finally, the Court has traditionally refused to impute to Congress any

intent to impose an "impossible burden" on an agency. *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). EPA normally grants about 100 requests for adjudicatory hearings per year in NPDES cases. The decision below would require thousands per year—even though in the vast majority no request for a hearing is ever made. Congress could not have intended to handicap the agency by imposing such a burden.

ARGUMENT

I. An Agency May Subject A Statutory "Opportunity For Public Hearing" To Reasonable Threshold Requirements Including A Requirement That The Applicant File A Request Setting Forth A Material Issue Of Fact

Absent constitutional or specific statutory constraints, administrative agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-525, 543 545 (1978). This principle of administrative law derives from "the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than [the] federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the

tasks of the agency involved." *FCC* v. *Schreiber*, *supra*, 381 U.S. at 290.

Only where Congress has unmistakably directed an agency to follow certain procedures is an agency deprived of its traditional authority to fashion its own procedure. Even then, the agency may adopt a practical view of the procedural directive. Thus, where a statute requires "a full hearing" before a license may be denied, the agency is free to deny the license without a hearing when the application shows an essential prerequisite cannot be met. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204-205 (1956). Even where the statute seemingly directs a "full hearing in all instances" the Court "never presume[s] that Congress intended an agency 'to waste time on applications that do not state a valid basis for a hearing.'" *Denver Stock Yard* v. *Livestock Association*, 356 U.S. 282, 287 (1958). The agency may thus impose a procedural prerequisite to such a seemingly mandatory hearing, such as a requirement that the applicant plead facts that would warrant an administrative waiver of its substantive rules precluding substantive relief. *FPC* v. *Texaco Inc.*, 377 U.S. 33, 39-41 (1964). Otherwise, there might be a "vast proliferation of hearings" serving no useful purpose. *Id.* at 44.

In Section 402, Congress directed that EPA may grant or deny an NPDES permit after "opportunity for public hearing." Although the statute itself does not state whether the "hearing" must be a legislative-type or an adjudicatory-type hearing, EPA's regulations provide both if certain threshold requirements are met. Assuming arguendo that the statute refers to an adjudicatory hearing—as the Ninth Circuit has held—the cases just cited establish that EPA may condition the "opportunity" on (i) the presentation of a request (ii) which sets forth a material issue of fact.

First, as explained, even where the statute literally insists on a "full hearing," it is well established that the agency may condition the hearing on a request. A fortiori, where the statute merely requires the agency to provide an "opportunity," the agency may key the hearing to a request. Any other construction would read the word "opportunity" out of the Act. *National Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 389 (1976).[14] Indeed, *Kleppe* forecloses any challenge to EPA's request requirement. There, as here, the statute required an "opportunity for a public

[14] The court of appeals' decision, in practice, will require EPA routinely to hold adjudicatory hearings on NPDES permit actions, even where no one requests a hearing and even where, as here, the proposed action is, for example, only a time extension of a permit whose conditions have been fully considered at previous "legislative" hearings. Thus, if EPA holds no adjudicatory hearing, all a complainant need do in order to set aside the agency's action, under the court's decision, is to suggest plausibly in the court of appeals that some members of the public might disagree concerning factual matters relevant to the Agency's action. Compare *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 553-554. This effectively means that EPA must hold an adjudicatory hearing in every instance and reduces the word "opportunity" to a nullity.

hearing" before the agency fined mine operators for violations of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 801 *et seq.* The agency adopted a regulation providing that its proposed determination of a violation and proposed fine would become final without a hearing if the operators did not request an administrative adjudication within 15 days after receipt of the proposed order. The Court held that this procedure provided operators with an "opportunity" for a hearing within the meaning of the statute. Likewise, Section 402 of the Clean Water Act requires "no more than 'an opportunity' for a hearing." *National Coal Operators' Association* v. *Kleppe*, *supra*, 423 U.S. at 398.

Second, EPA is similarly entitled to condition an adjudicatory hearing on the identification of a disputed issue of material fact. The whole point of an adjudicatory hearing is to resolve issues of contested fact. If the material facts are not disputed, no adjudicatory hearing is needed. Cf. Fed. R. Civ. P. 56. Precisely such a threshold requirement was sustained in *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973). There, the statute required the FDA to give " 'due notice and opportunity for hearing to the applicant' " before withdrawing a new drug application (*id.* at 620). In a threshold regulation serving the identical screening purpose as EPA's regulation, however, the FDA required any applicant who desired a hearing to submit reasons " 'why the application * * * should not be withdrawn, together with a well-organized and full-factual analysis of the

clinical and other investigational data he [was] prepared to prove in support of his opposition to the notice of opportunity for a hearing * * *. When it clearly appear[ed] from the data in the application and from the reasons and factual analysis in the request for the hearing that there [was] *no genuine and substantial issue of fact* * * *, *e.g.*, no adequate and well-controlled clinical investigations to support the claims of effectiveness,' " the FDA was free to deny a hearing and enter an order withdrawing the application based solely on these data. 21 C.F.R. 130.14(b). (Emphasis added.) 412 U.S. at 620.

The Court sustained this regulation against the challenge that it denied the statutory "opportunity" for hearing. The Court held that the type of regulation was well within the authority of agencies under *Storer* and *Texaco* to particularize statutory standards and to bar "at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." *Ibid.* The Court refused to "impute to Congress the design of requiring * * * a hearing when it appears conclusively from the applicant's 'pleadings' that the application cannot succeed." *Id.* at 621. Accord, *United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971); *Dyestuffs and Chemicals, Inc.* v. *Flemming*, 271 F.2d 281, 286-287 (8th Cir. 1959), cert. denied, 362 U.S. 911 (1960); *Sun Oil Co.* v. *FPC*, 256 F.2d 233, 240-241 (5th Cir.), cert. denied, 358 U.S. 872 (1958).

The same is true here. EPA's regulation conditions a hearing on the presentation of a "material

issue[] of fact relevant to the questions of whether a permit should be issued, denied or modified." 40 C.F.R. 125.36(c)(1)(ii). As in *Hynson*, this requirement avoids unnecessary and time-consuming hearings where, as here, no one challenges proposed agency action on disputed factual grounds.

In sum, in construing administrative statutes the Court has regularly construed them to permit agencies to condition statutory hearings on reasonable threshold requirements. Even where an act provides for a "full hearing" this canon of construction has been consistently applied. Here the language is even plainer—all that the agency need provide is an "opportunity" for a hearing. Unless that word is read out of Section 402, EPA is entitled to condition the right to an adjudicatory hearing (i) on the presentation of a request (ii) that frames a material issue of fact.

II. EPA's Regulations Are Consistent With The Legislative History Of The Act

Several pointers in the legislative history support the Administrator's regulations. First, nothing in it suggests that Congress meant to dispense with the traditional power of an agency to impose reasonable threshold requirements for a hearing. To the contrary, the Senate Report—the only report to address the phrase as used in Section 402—while stressing the importance of public participation in the permitting process, also stressed the word "opportunity":

> An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing by the Federal Government, or if State participation is approved by the Administrator, the State, and other provisions to make available to the public all relevant information surrounding a discharge source and the control requirements placed on it.

Leg. Hist. 1490. The word "opportunity" in both the statute and its legislative history cannot be ignored. An opportunity is provided by granting a hearing when reasonable threshold requirements are satisfied. That the public fails to make a satisfactory request does not mean that it was not provided with an opportunity to do so. To the contrary, the opportunity was provided, but not accepted. The legislative history uses the word "opportunity" in this traditional and natural sense.

Second, Congress used the phrase "opportunity for [public] hearing[s]" seven other times in the 1972 Act (see Sections 307(b)(1); 311(b)(6); 312(g); 316(a); 404(a) and (c); 507(b)). Nowhere in the legislative history of these seven provisions is there the slightest suggestion that EPA could not impose threshold requirements or condition the hearing on a request. Instead, in discussing Section 311(b)(6), which also used the phrase, the relevant report recites that EPA should adopt "procedures which are expe-

ditious" and specifically disclaims any intent to apply the strict adjudicatory hearing requirements of 5 U.S.C. 554. Leg. Hist. 804 (House Report). Although the comment does not address our specific issue, the committee's statement plainly evidences an intent not to dispense with the administrative flexibility this Court has long recognized in the phrase "opportunity for public hearing." [15]

Third, where Congress intended elsewhere in the Act to require hearings, it said so. For example, Section 307(a)(2), as originally enacted, provided that EPA, after publishing certain proposed effluent standards, "shall publish a notice for a public hearing on such proposed standard[s] to be held within thirty days." 86 Stat. 857. The Conference Report recognized that the agency was "required to hold a hearing" by this language. Leg. Hist. 312.[16] Congress' differentiation of "required" hearings and "opportunities" for hearings—both in the statutory language and the legislative history—makes clear that Congress understood the distinction. Cf. *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 11.

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[15] Otherwise the committee reports ignored the phrase, *e.g.*, Leg. Hist. 313, 800, 1479 (Section 307(b)(1)); 317-318, 805, 1485 (Section 312(j)); 329, 822, 1500-1501 (Section 507(b)); or simply repeated the statutory language, 746 (Section 316(d)); 324, 817 (Section 404(a)); 324-325 (Section 404(c)).

[16] Section 307(a)(2) was amended in 1977 to eliminate the mandatory hearing requirement. The amended provision expressly makes a hearing available only on request. 91 Stat. 1589.

In sum, the indications in the legislative history are all to the effect that Congress did not intend, in Section 402, to shackle the agency with a needless requirement in all cases. It remains only to determine whether such a mandate can be derived—as the court of appeals believed—from some generalized "strong policy" in favor of adjudicatory hearings.

III. There Is No Presumption That Congress Mandated Adjudicatory Hearings In All Situations

A. The court below based its interpretation principally on "the strong policy in favor of holding [formal] public hearings before an adjudicative decision is made" (586 F.2d at 659). The origins of this policy were not identified except by a citation to the discussion concerning the Administrative Procedure Act in the court's earlier opinion in *Marathon Oil*. The APA, however, does not establish any such policy. With certain exceptions not material here (see note 21, *infra*), the APA merely describes the rulemaking or adjudicatory procedures to be followed when the relevant substantive statute provides for such hearings. *Camp* v. *Pitts*, 411 U.S. 138, 141 n.3 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 238-246 (1973); *ITT* v. *Local 134, Int'l Bro. of Elec. Workers*, 419 U.S. 428, 438-441 (1975). A hearing voluntarily provided by agency regulation is not gov-

erned by the APA. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950).[17]

As we have seen, there is no suggestion in the statutory language or the legislative history establishing any public policy in favor of adjudicatory hearings in derogation of agencies' traditional power to set reasonable threshold requirements. To the contrary, the substantive statute provides only for an "opportunity" for a public hearing. That does not connote any automatic requirement of an adjudicatory hearing. "[T]he formal procedural requirements of the [APA] are invoked only where agency action 'on the record after opportunity for an agency hearing' is required by some other *statute*." *Attorney General's Manual on the Administrative Procedure Act* 41 (1947) (emphasis in original); see also *Administrative Procedure Act, Legislative History*, 79th Cong., 2d Sess. 22, 79, 226, 260, 359 (1944-1946). The absence of the phrase "on the record" from Section 402 demonstrates that Congress did not intend the APA-trial-type procedures for adjudicatory hearings to apply. See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972);

[17] The Ninth Circuit's reliance (586 F.2d at 658) on *Independent Bankers Association of Georgia* v. *Board of Governors*, 516 F.2d 1206 (D.C. Cir. 1975), is misplaced. There, a request was made which set forth material issues of fact. The court acknowledged that even where a statute confers a right to "a full hearing" the agency need not provide one where the agency's action does not rest on disputed issues of fact. *Id.* at 1220. As the concurrence in that decision put it, Congress normally does not require a hearing "that will be an empty sound, * * * signifying nothing." *Id.* at 1227.

United States v. *Florida East Coast Ry.*, 410 U.S. 224, 238 (1973).[18] Any doubt on this score is eliminated by the fact that twice elsewhere the 1972 Act explicitly requires proceedings to be "on the record" and subject to 5 U.S.C. 554[19] and by the fact that the legislative history specifically disclaims that the phrase "opportunity for public hearing" (used in a different section of the same Act) is intended to invoke the "on the record" provisions of 5 U.S.C. 554.[20] Thus, contrary to the Ninth Circuit's starting

[18] But see *United States Steel Corp.* v. *Train*, 556 F.2d 822 (7th Cir. 1977); *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977); *Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d 872 (1st Cir. 1978).

[19] Prior to the 1977 Amendments, Section 307(a)(2) required toxic pollutant effluent standards to be set "on the record." Section 507(e) specifically requires hearings under that subsection to be "of record and * * * subject to section 554 of title 5 * * *. The authors of the FWPCA clearly knew how to invoke the APA's formal adjudication requirements when they wished to.

[20] The phase "opportunity for a [public] hearing[s]" is used in seven other provisions in the 1972 Act (see page 27). The only passage in the committee reports to discuss the phrase (as used in Section 311(b)(6)) was "not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record * * *. The committee believes that effective administrative enforcement will be enhanced by assessment procedures which are expeditious." Leg. Hist. 804 (House Report).

The report goes on to state that "[p]rovisions of title 5 of the United States Code commonly referred to as the Administrative Procedure Act, as amended, will nevertheless apply to assure due process and protection of a respondent's rights." Leg. Hist. 804. In view of the prior sentence's disclaimer that

premise, the Section 402 hearing is not an APA-type adjudicatory hearing.[21]

Instead, the hearing contemplated by Section 402 combines both elements of a rulemaking proceeding and an adjudicatory hearing. Congress' emphasis on an opportunity for public participation in determining whether applicants may pollute the navigable waters illustrates the rulemaking aspects of the proceeding (see 33 U.S.C. 1251(e). The possible existence of factual issues and the fact that it is a permitting proceeding illustrate the adjudicatory aspects of the proceeding (see 5 U.S.C. 551(6), (7)). EPA did the practical thing and provided for both types of hearings, depending on what is appropriate in the circumstances of the case. The threshold requirements merely insure that the type of hearing, if any, provided fits the occasion. This type of hybrid procedure, which assimilates the statutory requirement into the practical administration of the statute, illustrates the wisdom of the Court's traditional deference to agencies in devising practical procedures to carry out their substantive duties. There is, however, no overriding public policy in favor of

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the proceeding would be "on the record," this reference to the APA was presumably to 5 U.S.C. 555(e), 558(c), and 706 (see note 21, *infra*).

[21] Although the rigid strictures of Section 554 do not apply to NPDES proceedings, other provisions of the APA are applicable. Notice of the denial of an NPDES application made in connection with any agency proceeding must be made promptly and accompanied by a brief statement of the grounds for denial (Section 555(e)) and licenses, once

APA-type adjudicatory hearings in licensing proceedings.[22]

B. Far from indulging a presumption that Congress always insists on full adjudicatory hearings, the Court has regularly refused to impute to Congress any rule that would place an "impossible burden" on the agency. Thus, in *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), the industrial petitioner argued that in issuing permits under the Federal Water Pollution Control Act Amendments of 1972 EPA was required to give individual consideration to the circumstances of each of the more than 42,000 dischargers who have applied for NPDES

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granted, may be revoked or suspended only after notice by the agency in writing of the facts which warrant the action and an opportunity to demonstrate or achieve compliance with all lawful requirements (Section 558(c)). These provisions do not apply here because the city's application was not denied, revoked or suspended.

[22] The court also reasoned (586 F.2d at 660) that an adjudicatory hearing would yield a record "that will provide the reasons" for the agency's action. This ignores a number of points. To begin with, the agency stated, in general, the reasons for the proposed extension in its initial notice of the proposed extension (A. 117). When Kilroy made legal objections to the proposed action, the agency fully explained its reasons for rejecting those legal grounds (A. 194-199). Thus, the agency stated its reasons for rejecting every objection presented to it. Furthermore, even if a sufficient basis for the agency's action was not clear to the court of appeals, the proper procedure was to remand to the agency for an explanation of its decision to extend the permit not to require a hearing on unrelated (and unspecified) issues. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971); *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973); cf. *Dunlop* v. *Bachowski*, 421 U.S. 560, 572-574 (1975).

permits rather than set effluent limitations primarily by classes and categories. *Id.* at 132-133. This construction, the Court said, would "place an impossible burden on EPA." Such "considerations of feasibility and practicality" led the Court to conclude "that Congress would [not] have failed so conspicuously to provide EPA with the authority needed to achieve the statutory goals." *Id.* at 133. Accord, *New England Divisions Case*, 261 U.S. 184, 197 (1923); *Bowles* v. *Willingham*, 321 U.S. 503, 517 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177-178 (1968); *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 653 (1973); *National Coal Operators' Association* v. *Kleppe, supra*, 423 U.S. at 399; *United States Steel Corp.* v. *Train*, 556 F.2d 822, 834 n.14 (7th Cir. 1977).

The court of appeals' decision, if followed, would place an intolerable burden on EPA. In *United States Steel Corp.* v. *Train, supra*, 556 F.2d at 834 n.14, the Seventh Circuit noted that of more than 42,000 dischargers who had applied for NPDES permits, only a "relatively small percentage of cases"—"about 2,000"—had involved requests for adjudicatory hearings. In fact, EPA now grants about 100 requests per year for adjudicatory hearings under the NPDES program. The court observed that if EPA were required to conduct an adjudicatory hearing on "a substantial proportion" of permit proceedings, "the entire permit program would have become hopelessly bogged down before the agency * * *."

It is easy to see why this would be so. All NPDES permits involve at least the *potential* for factual dispute. For example, questions can arise concerning the nature of given industrial processes, their similarity to or difference from other industrial processes, and how this should affect control requirements or classification under effluent guidelines; concerning the economic impact of the proposed discharge requirement, and alternative discharge requirements; concerning the plant itself and the company and community involved; concerning the dispersal and persistence of the discharge in the receiving waters, and its effect there on numbers of different species and concerning the eco-system generally. Therefore, if the court of appeals' decision stands and "[i]t must be shown that the material facts supporting the decision are not subject to dispute," 586 F.2d at 658-659, EPA would be required to hold an APA-type adjudicatory hearing covering such issues on every permit issued by it.[23] The court of appeals' ruling would require EPA to hold adjudicatory hearings in tens of thousands of cases whether or not such hearings were requested. The Court should not impute to Congress an intent to weaken enforcement of the Act by placing such an intolerable burden on EPA.

C. Finally, EPA's consistent interpretation of the Act—that the statutory "opportunity" for a hearing

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[23] In this case and in *Marathon Oil Co.* v. *EPA, supra*, the Ninth Circuit has held that the "hearing" referred to in Section 402 must comply with the full panoply of procedural rights provided by the Administrative Procedure Act, 5 U.S.C. 554, 556 and 557. 586 F.2d at 658.

is satisfied by requiring parties to request a hearing and to identify in advance material issues of designated fact—is entitled to deference. This is particularly appropriate where, as here, the statutory scheme is characterized by an unusual "complexity and technical nature," and "there has undoubtedly been reliance upon [the agency's] interpretation by the States" in implementing parallel provisions for State NPDES programs under Section 402(b).[24] *Train* v. *NRDC*, 421 U.S. 60, 87 (1975); *E. I. duPont de Nemours & Co.* v. *Train*, *supra*, 430 U.S. 134-135 & n.26; see *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976).

We conclude that, once EPA published notice of its proposed action,[25] it was not required to hold any adjudicatory hearing at all unless one was requested to determine a material issue of fact. No such issue was tendered. As a result, the court of appeals should

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[24] Under Section 402(b)(3) of the Act, 33 U.S.C. 1342(b)(3), a state which administers an approved NPDES program must

> insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and * * * provide *an opportunity for public hearing* before a ruling on each such application. [Emphasis added.]

[25] EPA's notice-and-hearing regulations, as mentioned above (note 9, *supra*), give any person or organization the right to request in advance that EPA mail them individual notice concerning any matter. 40 C.F.R. 125.32(a)(2). Respondents made no such request. Persons who choose not to make such a request rely on newspaper notice. *Ibid.* The new regulations continue this basic structure. See 40 C.F.R. 124.41, 44 Fed. Reg. 32931-32933 (1979).

have confined its review to the legal issues properly presented to the agency. Because the court of appeals did not disagree with EPA's resolution of these legal issues, the court should affirm EPA's extension of the Hyperion permit.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the decision below be reversed and that this case be remanded to the court of appeals.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1472

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

VS.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, SR., THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS PACIFIC LEGAL FOUNDATION AND JOHN B. KILROY, SR.

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BRIEF FOR RESPONDENTS PACIFIC LEGAL FOUNDATION AND JOHN B. KILROY, SR.

OPINION BELOW

The opinion of the Court of Appeals is reported at 586 F.2d 650 (9th Cir. 1978).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), in requiring the Environmental Protection Agency to provide "opportunity for

public hearing" prior to any issuance, denial, or modification of a discharge permit, requires EPA to conduct adjudicatory hearings before taking action on such permits where, after due notice of the proposed action, no one requests a hearing before the action is taken and a request made subsequently raises no material issue of fact.[1]

STATUTES AND REGULATIONS INVOLVED

The following citations are to statutes and regulations involved in this action which were not included in the Brief for the Petitioner.

1. Section 101(e) of the Federal Clean Water Act, 33 U.S.C. § 1251(e), provides:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States shall develop and publish regulations specifying minimum guidelines for public participation in such processes."

2. Sections 105.1, 105.2, and 105.7 of Title 40, Code of Federal Regulations, as promulgated by EPA on August

[1]The Court should note that the question as stated above is that upon which the writ of certiorari is granted. It includes incorrect factual assumptions that due notice was given and that the hearing request raised no material issue of fact. The question presented in the Brief for the Petitioner has been substantially modified from what was presented by petitioner in its Petition for Writ of Certiorari.

23, 1973, state in part as follows (38 Fed. Reg. 22,756 (1973)):[2]

> **"§ 105.1 Scope.**
>
> "This part sets forth minimum guidelines for public participation in the processes of development, revision and enforcement of any regulation, standard, effluent limitation, plan or program under the Federal Water Pollution Control Act, as amended (Public Law 92-500; 86 Stat. 816; 33 U.S.C. 1251), in accordance with section 101(e) of the Act. This part is applicable to all Environmental Protection Agency (EPA) components concerned with the Federal Water Pollution Control Act...."
>
> **"§ 105.2 Policy and Objectives.**
>
> "Participation of the public is to be provided for, encouraged, and assisted to the fullest extent practicable consistent with other requirements of the Act in Federal and State government water pollution control activities. The major objectives of such participation include greater responsiveness of governmental actions to public concerns and priorities, and improved popular understanding of official programs and actions. Although the primary responsibility for water quality decision-making is vested by law in public agencies at the various levels of government, active public involvement in and scutiny of the intergovernmental decision-making process is desirable to accomplish these objectives. Conferring with the public after a final agency decision has been made will not meet the requirements of this part. The intent of these regulations is to foster

[2]These regulations are presented as they were in effect at the time the challenged action was taken. They have since been substantially revised to include the public participation requirements of other acts in addition to the requirements of the Federal Clean Water Act. *See* 44 Fed. Reg. 10,292 (1979).

a spirit of openness and a sense of mutual trust between the public and the State and Federal agencies in efforts to restore and maintain the integrity of the Nation's water."

"§ 105.7 Guidelines for Public Hearings.

"Any public hearing, whether mandatory or discretionary, to be held under the Act shall be in conformity with this section. If conflict exists between the minimum guidelines of this section and requirements of State or Federal law or other regulations pertaining to a particular hearing, the more stringent requirements shall be observed.

"(a) *Purpose.*—Generally, a public hearing gives persons and organizations a formal opportunity to be heard on a matter prior to decision-making. Although public hearing testimony may focus on the prospective action to be taken in the form of a tentative plan or decision, the final actions shall benefit from and reflect consideration of the public hearing content.

. . . .

"(c) *Opportunity for Hearings.*—Where the opportunity for public hearing is called for in the Act, and in other appropriate instances, a public hearing shall be held if the hearing official finds significant public interest (including the filing of requests or petitions for such hearing) or pertinent information to be gained. Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunity for public participation."

3. Sections 125.5 and 125.35 of Title 40, Code of Federal Regulations, as promulgated by EPA on July 24, 1974, state in part as follows (39 Fed. Reg. 27,079 (1974)):[3]

[3]These regulations have since been revised. *See* 44 Fed. Reg. 32,854 (1979).

"§ 125.5 Delegation of authority.

"(a) . . . the following authorities are hereby delegated to each of the Regional Administrators for the area which he administers.

"(1) The authority to issue and condition permits or to deny applications for permits for discharge covered by the NPDES and by section 405 of the act.

. . . .

"(c) These authorities may be redelegated to the Director, Enforcement Division, of each region."

"§ 125.35 Issuance and Effective Date of Permit.

. . . .

"(b)(1) Where the determinations of the Regional Administrator pursuant to paragraph (a) of this section with respect to any permit are substantially unchanged from the tentative determinations and draft permit prepared pursuant to § 125.31 of this subpart, the Regional Administrator shall forward a copy of the determinations to any person who has submitted written comments regarding the permit."

STATEMENT OF THE CASE

The Federal Clean Water Act (Act), 91 Stat. 1566, 33 U.S.C. §§ 1251, *et seq.*, sets forth a comprehensive scheme to insure public participation in all phases of the administration of the Act. The specific duties placed on the Administrator of the Environmental Protection Agency require not only that he "provide for" public participation, but also that he take affirmative action to insure that such participation is "encouraged" and "assisted." 33 U.S.C. § 1251(e). This case involves an attempt by a public interest organization, Pacific Legal Foundation

(PLF), and an individual citizen, John B. Kilroy, Sr., to obtain an opportunity for a hearing on the issuance of a National Pollutant Discharge Elimination System (NPDES) permit for the City of Los Angeles Hyperion Wastewater Treatment Plant (Hyperion). The purpose of the hearing is to present to EPA, on a public record, information and arguments relating to the adverse impacts on people, fish, and wildlife which are certain to result from the implementation of EPA requirements for modifying the processing of wastewater at Hyperion.

Wastewater discharge requirements for Hyperion were set in an NPDES permit issued to the City of Los Angeles in August, 1975. A at 21. The permit required the City to cease its twenty-year-long practice of discharging digested sewage sludge[1] through a seven-mile-long outfall to a point over 300 feet below the surface of the Pacific Ocean at the mouth of a substantially deeper submarine canyon. This permit expired by its terms on February 1, 1977. A at 19. During 1976, a substantial public controversy arose when EPA announced for the first time that the alternative sludge disposal method would involve transporting millions of tons of sludge through the streets of Los Angeles in huge trucks for disposal in landfills near residential neighborhoods. During the same period, information

[1]Sewage sludge is defined as:
"A nonhomogenous residue resulting from chemical and physical treatment of waste water." Report to the Congress by the Comptroller General of the United States, *Problems and Progress in Regulating Ocean Dumping of Sewage Sludge and Industrial Wastes,* January 21, 1977.
At Hyperion, raw sludge is processed in anaerobic digestors which, with the addition of steam, convert the substance to methane gas, carbon dioxide, water vapor, and a residual substance called digested sludge.

was released from ongoing, intensive studies of the coastal waters of Southern California which showed no significant environmental impacts from the twenty years of sludge discharges. A at 76. The studies also indicated that the sludge discharge puts great amounts of nutrients into the marine waters and supports much of the marine life in Santa Monica Bay, including the best sport fishing areas. The alternative of trucking and dumping the sludge on land has many significant adverse environmental and social effects, even though many millions of dollars will be expended to implement this requirement. A at 64-65, 76-78, 200-04.

In the midst of this controversy, EPA initiated proceedings to issue a new permit for Hyperion. The notice expressly stated that a proposal was under consideration "to revise waste discharge requirements including effluent limitations and special conditions" for Hyperion. A at 206. During these proceedings, PLF objected to the appropriateness of the existing permit requirements and stated:

> "No similar requirement should be included in a future permit until a full environmental analysis, including economic and social factors of the ocean discharge of effluent and sludge, has been completed. As soon as possible, a new NPDES permit should be issued to the City of Los Angeles including only those conditions necessary to provide adequate protection to the marine environment directly affected by the discharge from the Hyperion Plant." A at 88.

The basis for this request was the need to consider "substantial scientific and technical information" which indicated that the modifications to Hyperion required in the

existing permit "would be environmentally, economically and socially undesirable." A at 87. To fully address the issues necessary to develop new permit requirements, PLF requested that EPA establish "a comprehensive environmental review . . . which would conform to the full requirements for study, analysis, public participation, open disclosure and open decision making of [the Act and other applicable laws]." *Id.* By filing these comments, PLF had become a participant in the permit proceedings and had requested a full hearing on the permit requirements.

On January 24, 1977, EPA announced that it did not have "[a]dequate review time" to consider "tentative waste discharge requirements" and issued an interim order delaying action on the City of Los Angeles' application for a new permit and extending the expiration date of the old permit to June 30, 1977. A at 93-95.

At some point after January 24, 1977, and before April 27, 1977, when EPA issued its notice of the action which resulted in this lawsuit, EPA decided to alter drastically the nature of the permit proceedings. The review of the sludge processing requirements, which had been requested not only by PLF but also by the City of Los Angeles (A at 65) and the Los Angeles Area Chamber of Commerce (A at 73), was abruptly and without explanation terminated.[5] A decision was made to extend the expiration date of the old permit to December 17, 1979. A at 117. Although PLF

[5]EPA appears to suggest that the April 27, 1977, notice announced a separate proceeding. Brief for the Petitioner at 12. However, the application for NPDES permit contained in the certified record is the one upon which the proceeding was initiated in December, 1976, and for which no final order had been entered. Certified Record at 81-118. The record also contains a suggestion by the California Regional Water Quality Control Board that EPA defer final action on the permit application until a date after the February 1, 1977, expiration date. Certified Record at 119.

was active as an interested person in the sludge controversy and had filed as a participant in the permit proceedings, requesting EPA to go through "the full requirements for . . . public participation, open disclosure and open decision making" (A at 87), PLF was given no notice of the intent to terminate the proceeding (Brief for the Petitioner at 12 n.9).

The basis for the decision by EPA to terminate the development of revised permit requirements has not been explained either in the record of the administrative proceedings or in the many documents outside the record submitted to the Court of Appeals. The only apparent, intervening, related event was the filing of a lawsuit on February 14, 1977, in which PLF, John B. Kilroy, Sr., as a member of PLF, four Los Angeles City Councilmen, and the City of Torrance, California, sought to obtain a court order to require EPA to conduct the desired review of the scientific data and environmental impacts related to the implementation of the sludge processing requirement.[6] One of the purposes of this lawsuit was to determine which sludge processing requirements were outside the scope of the NPDES permit and, therefore, subject to consideration pursuant to the requirements of the National Environmental Policy Act,[7] and to determine which requirements were within the scope of the permit and, therefore, subject to consideration in the permit proceeding. A at 134, 143-44.

[6]*PLF v. Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977), *appeal pending*, No. 77-3844 (9th Cir.).

[7]Section 511(c) of the Federal Clean Water Act, 33 U.S.C. § 1371(c), exempts the issuance of an NPDES permit from the requirements for the preparation of an environmental impact statement.

It was during oral argument in the District Court on May 23, 1977, that PLF was first notified that the effort to modify the permit requirements in which it was involved was being terminated. A at 145.

Attempts subsequent to that hearing to obtain information from the EPA Regional Office on what action had been taken and when it had occurred were rebuffed. A at 157. On June 10, 1977, PLF in desperation sent a Freedom of Information Act request to attempt to find out the date of the action and obtain a copy of the decision and the supporting documents. *Id.* On June 13, 1977, the day the Freedom of Information Act request was received by EPA, PLF was notified by telephone that EPA's action had been taken on June 2, 1977, and that a request for an adjudicatory hearing would be accepted only if filed that day. A protective request for hearing was rushed to EPA by mailgram. A at 159. This request was prepared in a vacuum. EPA had released no information to PLF other than the date of the action, and continued to withhold all information about the action taken until June 23, 1977. A at 171. This same day, EPA denied the request for adjudicatory hearing on the basis that the request had not identified any of the factual issues relevant to the action taken. A at 166. EPA then certified three "issues of law" which related to whether public participation should have been allowed in the permit issuance. These issues had no relationship to the impact on people, fish, and wildlife which would result from the Hyperion modification. A separate process was initiated by EPA to resolve EPA's selected issues. A at 168.

This petition for review of the Administrator's action was then filed to obtain a court order to reopen the administrative proceeding for consideration of the terms, conditions, and requirements contained in the permit for the Hyperion plant.

The Court of Appeals determined that on "the special circumstances of this case" (586 F.2d at 659), no opportunity for hearing was provided. The Court of Appeals indicated that "[t]he analysis supporting this conclusion must commence with *Marathon Oil Co. v. EPA,* 564 F.2d 1253, 1262 (9th Cir. 1977)." 586 F.2d at 658. In *Marathon Oil* the court had previously determined that the *type* of hearing required by Section 402(a)(1) of the Act was governed by 5 U.S.C. § 554. However, since neither *Marathon Oil* nor 5 U.S.C § 554 governs whether a hearing must be held, the court made no further reference to *Marathon Oil* or to 5 U.S.C. § 554 except to emphasize "the strong policy in favor of holding public hearings before an adjudicative decision is made." 586 F.2d at 659. Instead, the court followed "the observations of the court in *Independent Bank Ass'n of Georgia v. Board of Governors of the Federal Reserve System,* 516 F.2d 1206 (D.C. Cir. 1975), concerning the 'opportunity for hearing' provision." 586 F.2d at 658. In that case, the District of Columbia Circuit stated that, where Congress has plainly given interested parties the right to a full hearing, the agency has a burden to justify a refusal to provide a hearing. 516 F.2d at 1220.

In addition, the Court of Appeals determined that there were several factual issues which should have been determined on an administrative record but "with respect to which the record in this case is silent." 586 F.2d at 659.

The existence of these issues convinced the court that a hearing should be held, especially in light of the special circumstances of this case, including the overlapping of federal and state regulatory authorities, the request by Kilroy for a hearing, and the failure of EPA to provide any explanation of its action. 586 F.2d at 659-60.

SUMMARY OF ARGUMENT

The primary basis for the Petition for Writ of Certiorari was an asserted conflict between the decision of the Court of Appeals and the decision of this Court in *National Independent Coal Operators' Association v. Kleppe,* 423 U.S. 388 (1976). The question presented in the Brief for the Petitioner, however, has been substantially modified so as to remove that issue and inject a new issue not previously raised regarding the type of hearing which must be held for the issuance of an NPDES permit. For this reason, it is suggested that the writ should be dismissed as improvidently granted.

The Brief for the Petitioner also seeks an opinion as to the validity of certain EPA regulations imposing "threshold requirements" on interested persons seeking a hearing. Review of this question is unnecessary and would not change the results of the decision below. PLF and Kilroy did not challenge the facial validity of EPA's regulations. The issues presented and decided in the Court of Appeals claimed EPA had violated or erroneously applied the pertinent regulations. The decision below did not hold any regulation to be invalid.

On the facts of the case, the principal issue is the holding of the Court of Appeals that EPA was obligated to hold a

hearing prior to issuing the Hyperion permit or to demonstrate to the court that a public hearing was unnecessary. This holding is supported by the Legislative History of the Act which shows that the hearing requirement of Section 402(a), 33 U.S.C. § 1342(a), of the Act was established as part of a comprehensive public participation program. The requirements of Section 101(e), 33 U.S.C. § 1251(e), of the Act that the Administrator encourage and assist public participation apply to the NPDES hearings. EPA's own public participation regulations (40 C.F.R. Part 105) are also expressly made to apply to the NPDES hearings. Since the facts of this case meet the requirement in those regulations that hearings shall always be held if there is "significant public interest" or "pertinent information to be gained," the Administrator clearly erred in not providing a hearing and the court could reach no other conclusion on a record "barren of any explanation." 586 F.2d at 660.

The possibility of effective public participation in the permit action was frustrated by EPA's failure to give notice of its proposed action to PLF, Kilroy, or other interested persons. EPA's regulations adopt the general principle that notice must be "circulated in a manner designed to inform interested and potentially interested persons." 40 C.F.R. § 125.32(a). EPA had the addresses for both PLF and Kilroy, who were well established as persons interested in the Hyperion permit. However, EPA's only notice for public participants was a fine print announcement in the legal notices section of the *Los Angeles Times,* a form of notice well established to be inadequate when addresses are available.

The last chance for any public participation was lost when EPA refused to disclose any information about what it was doing in the days immediately before and after the challenged action was taken. PLF had inadvertently learned during a court hearing that EPA was taking some form of action on the Hyperion permit. EPA, however, would not release any information about the action and required that a request for adjudicatory hearing be prepared and filed on a few hours notice with no knowledge of the actual substance of the action or the procedures employed. These actions by EPA, which violated provisions of law and regulation as well as any concept of fair procedure, excused the lack of specificity in the hearing request. EPA nevertheless denied the hearing request on the technical basis that it failed to specify material issues of fact. This claimed basis for refusing the requested hearing is utterly without merit, since EPA admitted to the Court of Appeals that the request for hearing raised factual issues relating to the controversial sludge processing requirements in the permit.

The opinion of the Court of Appeals gives full effect to the strong policy expressed by Congress that there would be full public participation in the NPDES program. Moreover, since the hearing requirement which the court enforced is consistent with the existing requirements of EPA's regulations, the decision achieved a desired result without imposing significant new burdens on EPA. By forcing the Administrator to recognize the mandates of Congress for public participation, the Court of Appeals has corrected a serious shortcoming in EPA's administration of the Act.

ARGUMENT

I

THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

The writ of certiorari was granted to review the question:

> "Whether Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), in requiring the Environmental Protection Agency to provide 'opportunity for public hearing' prior to any issuance, denial, or modification of a discharge permit, requires EPA to conduct adjudicatory hearings before taking action on such permits where, after due notice of the proposed action, no one requests a hearing before the action is taken and a request made subsequently raises no material issue of fact."

In presenting the case on the merits, petitioner Administrator of the Environmental Protection Agency has made two significant changes to the question presented. All reference to the failure to request an adjudicatory hearing before the action was taken has been deleted in face of the uncontroverted fact that a request for an adjudicatory hearing was filed in the manner required by EPA regulations. A at 159. This modification in the question presented removes from the case the primary basis for the petition for writ of certiorari—the asserted conflict between the decision of the Court of Appeals in this case and the decision of this Court in *National Independent Coal Operators' Association v. Kleppe,* 423 U.S. 388 (1976). Petition at 13-16.

In his second change, the Administrator inserts the descriptive phrase "APA-type" before "adjudicatory hearings" to raise the new issue of whether Section 402(a)(1)

of the Federal Clean Water Act requires that adjudications under that section comply with 5 U.S.C. § 554. The Brief for the Petitioner focuses primarily on this question and on a related question of whether EPA's NPDES permit regulations as they existed prior to their recent comprehensive revision were valid.[8] Under the facts of this case, however, no hearing was allowed. Thus, the only question raised was whether a hearing should have been conducted at all, not the nature of the hearing required. If the proceedings are reopened for any type of hearing, PLF and Kilroy can obtain an adjudicatory hearing simply by submitting a request pursuant to EPA's regulations. 40 C.F.R. § 125.36. The ultimate conclusion of the Court of Appeals that EPA had unlawfully refused to provide an opportunity for a public hearing was not dependent upon the question of whether the hearing, if held, would be subject to 5 U.S.C. § 554. Nor was the holding of the court based on a determination that any portion of the now revised regulations was invalid.

Since the Administrator has significantly modified the question presented and seeks now to use this case merely as a vehicle to obtain an advisory opinion on questions not in issue between the parties in the court below and only casually referred to in the opinion of that court, respondents respectfully suggest that the writ of certiorari should be dismissed as improvidently granted.[9] *Jones v. Hildebrant*, 432 U.S. 183 (1977).

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[8] *See* note 2, *supra*.

[9] The Court should also be aware that the permit expires December 17, 1979. A at 149. However, EPA has not initiated procedures to issue a new permit. Thus, it appears that EPA intends to allow the controversial permit to extend beyond that date by operation of 5 U.S.C. § 558(c) and thereby avoid the mooting of this case.

II

THE VALIDITY OF EPA'S PERMIT REGULATIONS HAS NOT BEEN QUESTIONED IN THIS CASE

The Administrator insists that "[t]he issue presented in this case is whether EPA's regulations (40 C.F.R. Part 125) provide a sufficient 'opportunity for public hearing' within the meaning of Section 402(a)(1) of the Act." Brief for the Petitioner at 17. The Administrator apparently reaches this issue by assuming that he had fully complied with all requirements of law and regulation relating to public participation in the issuance of an NPDES permit. This assumption is false. The procedural challenges which PLF and Kilroy took to the Court of Appeals were based on the failure of EPA to fulfill its obligation under the Act and its own regulations which require public participation and the involvement of interested and potentially interested persons. The real issues are whether EPA violated its public participation regulations (40 C.F.R. Part 105) by failing to give notice to PLF and Kilroy or to provide for, encourage, and assist their participation in a hearing on the action taken; and whether EPA violated or erroneously applied the NPDES permit regulations when it failed to give direct notice of the proposed action to PLF and Kilroy, refused to release information on the action when taken, and denied a written request for an adjudicatory hearing.

Nowhere in the opinion below does the court state that any part of EPA's regulations is invalid. The Court of

Appeals concluded that on the facts of this case the Administrator had not demonstrated that he had met his public participation obligations in this particular permit action. The arguments which follow demonstrate that this conclusion is fully supported by the requirements of the Act and EPA's regulations when applied to EPA's questionable conduct in this case.

III

THE COURT OF APPEALS PROPERLY DETERMINED THAT EPA HAD FAILED TO DEMONSTRATE THAT AN ADEQUATE OPPORTUNITY FOR A HEARING HAD BEEN GIVEN

The focal point of the concerns of EPA is the conclusion by the Court of Appeals that a showing "must be made to demonstrate that adequate opportunity for a hearing has been given. The necessity of a hearing turns not only on the vigor with which the parties clamor for one but also on whether a showing has been made demonstrating that a hearing is unnecessary." 586 F.2d at 658. The reasonableness of this conclusion must be examined in light of the law and regulations which apply to the procedures in question.

This case arises in the context of requirements of law much more comprehensive than a bare mandate that an opportunity for hearing be provided. The hearing provisions of the Act were intended to accomplish far more than simply to provide for adjudication of pertinent factual questions. It was the intention of Congress that all aspects of the Act would be "administered and enforced in a fishbowl-like atmosphere." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 249 (1973) (hereinafter cited as Leg. Hist.). This

purpose was to be accomplished through a comprehensive public participation program which would include the public hearing requirements as one element. Although Section 402(a) establishes the requirement for a hearing, the provision of law governing the manner in which the hearing is to be provided is Section 101(e) of the Act:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."

The interlocking of the requirements of Sections 101(e) and 402(a) of the Act was emphasized by Representative Dingell during the House debate on overriding the President's veto:

> "I reiterate my comments on the importance of section 101(e) of this bill which encourages public participation in the development, revision and enforcement of various actions taken under this statute. I sincerely hope that the Administrator understands that this applies across the board, including the establishment of the permit program under section 402 of the bill." Leg. Hist. at 108.

Far from understanding this relationship, the Administrator rejects it. He argues that his entire obligation under the Act was met by the publication of nine inches of single-column fine print in the legal notice section of the *Los Angeles Times*. A at 128. He supports his action by claiming that the burden rests entirely on the would-be public participants:

> "That the public fails to make a satisfactory request does not mean that it was not provided with an opportunity to do so. To the contrary, the opportunity was provided, but not accepted." Brief for the Petitioner at 27.

The Act requires more. "The public must have a *genuine* opportunity to speak . . . ." Leg. Hist. at 1490 (emphasis added). Even if it is assumed that the minimal action of the Administrator fulfilled the obligation to provide for a hearing, there was not even a minimal effort to either encourage or assist public participation in the permitting process.

The Legislative History repeatedly emphasizes the importance of public participation in the NPDES control program under Section 402 of the Act:

> "An *essential element* in any control program involving the nation's waters is *public participation*. The *public* must have a *genuine opportunity* to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing . . . . *The scrutiny of the public* and the exercise of authority under [Section 402] is *extremely important* in insuring expeditious implementation of the authority and a high level of performance by all levels of government and discharge sources." Leg. Hist. at 1490 (emphasis added).

In very strong language, the Legislative History states that the purpose of the hearing requirement is to force a reluctant EPA to accept input on a "public record" on matters it might prefer to decide without public scrutiny:

> "[T]he Committee is also concerned that this movement to the courts may have been brought about by inadequate recognition on the part of the administrative agencies as to the proper role of the public. Time and time again during the hearings evidence was submitted as to decisions made by Federal agencies without appropriate consultation with the State and local governments or the general public. And what is true about the Federal agencies is also true of the State and local government agencies. It is with the understanding that steps are necessary to restore the public's confidence and to open wide the opportunities for the public to participate in a meaningful way in the decisions of government, that the Committee has included in the proposed legislation various steps to arrive at this goal. First, the Committee has included provision for public participation in the development, revision and enforcement of any regulation, standard or effluent limitation established by the Administrator or any State under this Act. Not only is this specifically required in section 101(a) [*sic*] but the *Administration is directed to encourage this participation.* Second, the Committee has included provision in most instances where a determination is to be made by the administrator or the State, that *such determination shall be made as part of a public record.*" Leg. Hist. at 819 (emphasis added).

The hearing required by Section 402(a) serves the dual purpose of adjudicating pertinent facts and developing required advice and consultation from the public. The hearing requirement in Section 402(a) was inserted as part of a program woven through the Act intended "to open wide the opportunities for the public to participate in a meaningful way" in order "to restore the public's confidence"

in the decisions of EPA so as to lessen the tendency toward "having the forum for decision-making be in the courtroom." Leg. Hist. at 819. *See also State of Alabama ex rel. Baxley v. Environmental Protection Agency*, 557 F.2d 1101, 1110 (5th Cir. 1977).

The Administrator acknowledges that Section 101(e) of the Act applies to the NPDES permit program and requires him to use the Section 402(a) hearings not only to adjudicate facts but also to obtain public participation. Brief for the Petitioner at 32. Yet, in practice, he utterly ignores this obligation to use the hearing process as a wide open means of communicating with the public at large. In this case he took a major permitting action for a controversial permit for one of the largest urban areas in the country with absolutely no public participation at all. It is undisputed that EPA did nothing to encourage and assist public participation in this major action. Even worse, the record clearly shows that EPA officials engaged in a practice of withholding information, issuing an obscure and confusing notice, and taking the exceptional actions of terminating cooperative consideration of permit requirements and unilaterally extending the expiration date of the controversial permit. These actions made effective public participation impossible. Moreover, when PLF and Kilroy discovered what was going on and attempted to raise a challenge, EPA withheld all information, demanded that the challenge be filed on a few hours notice without benefit of any information or explanation of what had occurred, and then asserted "threshold barriers" to block any form of public participation.

These improper actions not only violated the clear intent of Congress, but also directly contravened the requirements of EPA's regulations implementing Section 101(e) of the Act which were in effect at the time the hearing was refused. These regulations explicitly applied the public participation requirements of Section 101(e) of the Act to the hearing requirement of Section 402(a) of the Act.

> "Any public hearing, whether mandatory or discretionary, to be held under this Act shall be in conformity with this section. If conflict exists between the minimum guidelines of this section and . . . other regulations pertaining to a particular hearing, the more stringent requirements shall be observed." 40 C.F.R. § 105.7.

The requirements of this section of the regulations make it clear that the Administrator had an obligation under the circumstances of this case to provide a public hearing regardless of whether one was expressly requested:

> "Where the opportunity for a public hearing is called for in the Act, and in other appropriate instances, a public hearing *shall* be held if the hearing official finds significant public interest (including the filing of requests or petitions for such hearing) or pertinent information to be gained. *Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunities for public participation.*" 40 C.F.R. § 105.7(c) (emphasis added).

The more stringent requirements for the provision of hearings which are placed on EPA's staff by this section supercede any "threshold requirements" on would be participants found elsewhere in the regulations. 40 C.F.R.

§ 105.7. Therefore, without regard to any individual request for a hearing, EPA was obligated to conduct a hearing if (1) there was significant public interest in the permit, or (2) there was pertinent information to be gained. Moreover, such hearings were required unless the Agency established beyond "doubt" that there was no significant public interest or pertinent information to be gained. In the event no "hearing" was to be allowed, the Regional Administrator was under an additional obligation to provide an alternative opportunity for public participation. No such alternative opportunity was provided.

The record before the Court of Appeals clearly established that "significant public interest" existed in this particular permitting action. A at 63-88, 129-47, 200-04, Among the concerns raised by public expression was "[t]he need for this additional notice and the required holding of hearings" concerning the manner in which sludge disposal was to be handled at Hyperion. A at 79. The Regional Administrator had even signed a sworn affidavit in which he acknowledged the existence of the "controversy" over the question of the sludge processing requirements at Hyperion. A at 111.

On the question of "pertinent information to be gained," the prior communications to EPA had emphasized the importance of EPA considering the "substantial scientific and technical information" which would require a modification of the permit requirements. A at 87. EPA was even informed of the primary source of this information. A at 76. Nonetheless, no opportunity to submit the pertinent information was allowed.

The Court of Appeals also identified the need under the facts of this case for an opportunity to present pertinent

information relating to "the division of jurisdiction over discharges in the ocean between the federal and state authorities which significantly complicates compliance by an affected agency." 586 F.2d at 659. EPA was clearly aware of the fact that a conflict existed between the compliance dates established in the permit by EPA and those established by the co-permitting authority, the California Regional Water Quality Control Board. A at 18, 54-62. Some form of hearing or alternative procedure was obviously required to resolve this conflict, particularly since the modifications to Hyperion controlled by these inconsistent compliance dates were the center of the public controversy. The Court of Appeals' conclusion that the "reasonableness of the EPA's compliance schedule depends upon facts that may be disputed and with respect to which the record in this case is silent" (586 F.2d at 659) is fully supported by the record.

The Court of Appeals had before it uncontroverted evidence that EPA was aware that interested persons were anxious to participate in a review of the permit conditions and that, as provided in 40 C.F.R. § 105.7(c), there was "significant public interest" and "pertinent information to be gained." *See* 586 F.2d at 659 n.3. Since the principal purpose of the Section 402(a) hearing requirement was to force EPA to obtain such input before making decisions on permits and since Section 105.7(c) of EPA's regulations required that a hearing "shall" be held under such circumstances, EPA was clearly obligated to have conducted a hearing. Yet, the record "is barren of any explanation of the extension of June 2, 1977,"[10] 586 F.2d at 660. Under

[10]EPA suggests that the reasons for the action taken were explained in its published notice. Brief for the Petitioner at 33 n.22. In the four-page notice (A at 117-20), however, only two sentences describe the action being taken (A at 118, last paragraph). No reasons are stated.

these facts, the Court of Appeals was justified in concluding that EPA was obligated to explain why a hearing was unnecessary and that in the absence of an adequate explanation EPA had failed to demonstrate that it had provided an adequate opportunity for a hearing as intended by Congress.

IV

EPA DID NOT PROVIDE DUE NOTICE OF ITS DECISION TO TERMINATE CONSIDERATION OF REVISED DISCHARGE REQUIREMENTS

A fundamental requirement of due notice is that it be communicated in a manner " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Memphis Light, Gas and Water Div v. Kraft,* 436 U.S. 1, 13 (1978), *quoting from Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314 (1950). EPA's regulations adopted this standard as a basic requirement governing notice of NPDES permit actions:

> "Public Notice of the proposed issuance, denial or modification of every permit or denial shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny or modify a permit for the discharge." 40 C.F.R. § 125.32(a).

In cases since *Mullane,* this Court has consistently rejected claims that a fine print newspaper notice will satisfy a requirement that a notice be reasonably calculated to apprise interested parties when the government agency involved could obtain names and addresses for direct notice. *See, e.g., Schroeder v. City of New York,* 371 U.S. 208, 211-13 (1962). EPA had addresses for both PLF and

Kilroy who were well established prior to April 27, 1977, as persons interested in the Hyperion permit. Not only had PLF filed written comments in the permit proceeding then underway (A at 84), but also PLF and Kilroy had been engaged in active litigation with EPA for over two months attempting to determine which of the alternative sludge processing requirements for Hyperion were conditions in the permit and which were merely grant conditions (A at 129). In spite of this activity and the public controversy which had forced EPA to agree to prepare an environmental impact statement on the sludge processing requirements (A at 111), the notice was sent only to the City of Los Angeles, the California Regional Water Quality Control Board, and four federal offices (A at 115-16). No effort was made to contact PLF, Kilroy, or any other public participants.

EPA has not suggested that it designed its manner of communicating notice so as to reach either PLF at its Sacramento, California, office or Kilroy in Los Angeles. Instead, EPA claims a technical defense that the regulations require no more than what was done. Brief for the Petitioner at 36 n.5. This claim relies on the minimum provisions of 40 C.F.R. §§ 125.32(a)(1) and (2) and ignores the principal notice requirement contained in 40 C.F.R. § 125.32(a) that notice procedures in each case must be "designed to inform interested and potentially interested persons." As recognized by the Court of Appeals, publication of a small notice in the back pages of a major metropolitan newspaper is hardly designed to inform an interested organization located over 350 miles away or even a

specific interested person among the millions of inhabitants of the general Los Angeles area. 586 F.2d at 659 n.3.

EPA also suggests that "[t]he Court of Appeals did not question that EPA had complied with its notice-and-hearing regulations." Brief for the Petitioner at 16. To support this assertion, citation is made to 586 F.2d at 653-54, the "Background" section of the opinion where the court merely recites the events which occurred. Contrary to EPA's suggestion, the Court of Appeals did address the issue of adequacy of notice and decided it adversely to EPA. The court took up PLF's and Kilroy's challenge to the adequacy of the notice[11] within the context of the question of whether under the facts of this case the right to a hearing had been waived. 586 F.2d at 658-59 n.3. The court distinguished between the direct notice given the City of Los Angeles (petitioner in the consolidated action before the Court of Appeals) and the newspaper notice given PLF and Kilroy. The court concluded that the newspaper notice was inadequate to establish that PLF and Kilroy had been given an adequate opportunity for a hearing. This conclusion necessarily entails a finding either that EPA failed to circulate the notice in a manner designed to inform PLF and Kilroy as required by the regulations or that EPA's regulations failed to fulfill the public participation requirements in the Act. Since the court would have clearly stated any intention to invalidate the regulations (which

[11]The challenge to the adequacy of the notice, in addition to raising the issue of the manner of communication, also set forth that the permit referred to in the notice was the 1974 permit which had been rescinded, not the 1975 permit which was actually extended. In addition, the notice failed to identify which of the various conflicting sludge compliance schedules was to be required.

apply to every other NPDES permit action), it is apparent that the court concluded that it was EPA's actions in this case which were invalid, not EFA's regulations.

V

THE REQUEST FOR ADJUDICATORY HEARING ADEQUATELY RAISED FACTUAL ISSUES RELATING TO THE SLUDGE PROCESSING REQUIREMENTS IN THE HYPERION PERMIT

The Administrator in his brief emphasizes his right to impose "reasonable threshold requirements" on persons seeking to obtain an opportunity for a public hearing under the Act. Brief for the Petitioner at 21-29. In so doing, he attempts to place at issue before this Court the validity of his regulation which required persons who desired an adjudicatory hearing to state issues of fact. The question of the validity of this regulation was not raised before the Court of Appeals. This Court will find no mention of this issue or of the particular regulation in the decision for the reason that EPA *admitted* that the request for adjudicatory hearing raised issues of fact relating to sludge disposal requirements:

> "Given a second chance to request a hearing under 40 C.F.R. § 125.36, only one Petitioner (Kilroy) took advantage of it, and his request raised only procedural legal issues and issues concerning the land-based sludge disposal method used to implement the sludge phase-out conditions of the permit." Brief for Respondents (before the Court of Appeals) at 38 (footnote omitted).[12]

[12]For the convenience of the Court, this brief has been lodged with the clerk.

This admission was repeated:

> "Even petitioner Kilroy's request for an adjudicatory hearing refers to the interim sludge project." Brief for Respondents (before the Court of Appeals) at 39-40.

EPA's explanation for not allowing a hearing on these issues was simply that it considered them to be irrelevant to the permit provisions. Brief for Respondents (before the Court of Appeals) at 36-37. Since the Court of Appeals decided that the issues admittedly raised by the request were relevant and should have been adjudicated before the permit was extended (586 F.2d at 659), the validity of the regulation was not placed in issue.

Before this Court, the Administrator does not seek review of the determination by the Court of Appeals that the factual issues concerning the sludge processing requirements are matters which should be addressed in a proper hearing. Instead, he attempts to take back his admission as to the facts and litigate for the first time in this Court a challenge to the validity of his own regulation—a challenge which only he has raised.

Even if this Court decides to disregard the admission of facts before the court below, the issue of the facial validity of 40 C.F.R. § 125.36(c)(1) still is not raised by this case. The claim of PLF and Kilroy is that they had substantially complied with the requirement in the regulation to raise factual issues and that EPA misused the regulation in a manner which violated other provisions of the Act and the regulations.

The requirement that a request for an adjudicatory hearing raise factual issues must be applied in a manner consistent with the public participation requirements of

Section 101(e) of the Act. As EPA's own regulations provide, any question of doubt should be resolved in favor of holding the requested hearing. 40 C.F.R. § 105.7(c). Within the context of (1) the controversy over the sludge processing requirements, (2) EPA's agreement to study the environmental claims which had been raised relating to the sludge processing requirements, and (3) the confusion and lack of information over what EPA had in fact done on June 2, 1977, the mailgram communicates as much information as can reasonably be expected on the request to adjudicate on an adequate record the environmental impacts of the permit requirements for sludge processing.

Any lack of specificity in the mailgram request was caused by EPA's own misconduct in refusing to release information on what had occurred[13] and withholding notification of the date the action was taken until the day the hearing request was demanded. Under these circumstances, a deliberate narrow reading of the request for hearing by EPA cannot be sanctioned. *Cf. Save our Sound Fisheries Association v. Callaway,* 429 F. Supp. 1136, 1144 (D.R.I. 1977) (EPA's violations of the Act prevented plaintiffs' filing a timely notice of citizen's suit.)

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[13]In failing to provide PLF with a copy of the decision, EPA violated the requirement of its own regulations that "the Regional Administrator shall forward a copy of the determination to any person who has submitted written comments regarding the permit." 40 C.F.R. § 125.35(b)(1). PLF had submitted such written comments when the proceeding was first initiated. A at 84. The refusal to provide PLF with a copy of the final decision was also a violation of 5 U.S.C. § 552(a)(2). It should be noted that to this day EPA has not produced the decision itself. The only document produced is a letter from a staff member (Terry L. Stumph) whose position is not described. This letter only communicates that the decision had been made. A at 149-50. The decision itself had to be made by either the Regional Administrator (Paul DeFalco, Jr.) or the Director, Enforcement Division (R. L. O'Connell). 40 C.F.R. §§ 125(a)(1) and (c).

VI

THE REQUIREMENTS IMPOSED BY THE COURT OF APPEALS DO NOT PRESENT A SERIOUS HINDRANCE TO EFFECTIVE ADMINISTRATION OF THE ACT

The Administrator devotes a substantial portion of his argument to the holdings in several other cases in three Courts of Appeals that the Administrative Procedure Act (APA), 5 U.S.C. § 554, applies to the issuance of NPDES permits.[14] The question of the applicability of the APA, however, does not determine the result in this case. The issue presented herein is whether a hearing of any type should have been held, and the Court of Appeals did not rely upon the prior holdings to conclude that PLF and Kilroy had not been given an opportunity for a hearing. However, the question of the applicability of the requirements of the APA is of significant public importance and must not go by default should this Court decide to address it.

To start his argument, the Administrator points to the lack of the words "on the record" in Section 402(a) of the Act. He relies on two leading cases dealing with rule making procedures which hold that, in the absence of these words, a question is raised as to whether Congress intended the formal hearing requirements of the APA to apply. Each case, however, emphasizes that the words "on the

[14]This issue was not raised in the petition for certiorari, but has been added to the question presented in the Brief for the Petitioner. The three cases which reached this holding are *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977); *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977); and *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978).

record" are *not* required in the statute and that the holdings of the cases do not apply to adjudication.

> "We do not suggest that only the precise words 'on the record' in the applicable statute will suffice to make §§ 556 and 557 applicable to rulemaking proceedings." *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972). *See also United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 238 (1973).
>
> "[T]hese decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *Florida East Coast Railway Co.*, 410 U.S. at 245. *See also Allegheny-Ludlum*, 406 U.S. at 757.

The question presented is significantly different when the agency action is an adjudication rather than rule making. Unlike rule making, adjudications have a direct effect on individuals and are oriented to the facts of the particular case. Moreover, rule making actions not subject to Sections 556 and 557 of the APA are governed by the alternative "notice and comment" procedures in Section 553. However, if Section 554 of the APA does not apply, there is no alternative procedure for adjudication in the APA. The courts, therefore, are obligated, as each of the circuits to address this issue has done, to go beyond the words in a statute such as Section 402(a) of the Act to discern the intent of Congress as to the procedural protections to be provided.

Although the analyses of the requirements of Section 402(a) of the Act by the three circuits differ, each is well

reasoned and speaks for itself in identifying those factors which convincingly indicate that 5 U.S.C. § 554 applies. In *Marathon Oil*, the Ninth Circuit identified that the nature of Section 402(a) proceedings is to focus on an individual discharger in an action which is likely to be based on disputed factual matters. (The Administrator admits that "[a]ll NPDES permits involve at least the *potential* for factual dispute." Brief for the Petitioner at 35 (emphasis in original).) The court concluded that such actions were within the category of proceedings Congress sought to address in the APA. Since the Legislative History of the Federal Clean Water Act did not indicate that the APA would not apply, and since the Act provided for judicial review which could only be effective on an administrative record, the court concluded that Congress intended that Section 554 of the APA should apply. *Marathon Oil*, 564 F.2d at 1262-64.[15] The Administrator, however, argues that the Legislative History "specifically disclaims any intent to apply the strict hearing requirements of 5 U.S.C. 554." Brief for the Petitioner at 27-28. To support this claim, he cites a comment from the Legislative History that "EPA should adopt 'procedures which are expeditious.'" The full statement at this point in the Legislative History, however, expressly contradicts the Administrator's claim and supports the opposite conclusion reached by the Court of Appeals:

[15]It should be noted that the Seventh Circuit found a requirement in 5 U.S.C. § 558(c) that EPA hold adjudicatory hearings in addition to the requirement of 5 U.S.C. § 554. *United States Steel Corp. v. Train*, 556 F.2d 822, 833-34 (7th Cir. 1977). The Administrator does not challenge that independent requirement for adjudicatory hearings.

> "The language 'notice and opportunity for a hearing' of Section 311(b)(6) is not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record before a hearing examiner such as are used for ratemaking and similar federal rule issuance. The committee believes that effective administrative enforcement will be enhanced by assessment procedures which are expeditious. Provisions of Title 5 of the United States Code commonly referred to as the Administrative Procedure Act, as amended, will *nevertheless apply* to assure due process and protection of a respondent's rights." Leg. Hist. at 804 (emphasis added).[16]

Thus, the Legislative History removes any doubt that Congress intended that the procedural protections afforded by 5 U.S.C. § 554 would apply when the Act provides an "opportunity for hearing."

The Administrator also challenges the reference by the Court of Appeals to the "strong policy in favor of holding public hearings before an adjudicative decision is made." 586 F.2d at 659. This Court, however, has recently affirmed the existence of such a policy and established that the type of proceedings required for adjudicative decisions must be determined from an analysis of the nature and effect of the decision Congress intended to be made:

[16]Later in his brief the Administrator acknowledges editing the Legislative History. He claims, however, that the entire statement is contradictory because prior to stating that the APA shall apply it indicates that "complex procedural requirements" are not intended to be required "in every instance." Brief for the Petitioner at 31-32 note 20. There is no contradiction in the statement. Section 554 of the APA does *not* require "in every instance the complex procedural requirements associated with formal adjudicatory hearings." *See infra* at 37. Moreover, it is clearly Sections 554, 556, and 557 which provide "due process and protection of a respondent's rights" in "a hearing" to which this statement refers.

> "[T]his court has been willing to assume a Congressional solicitude for fair procedure, absent explicit statutory language to the contrary. See Greene v. McElroy, 360 U.S. 474, 507-508 (1959)." *Califano v. Yamasaki,* ..... U.S. ....., 99 S. Ct. 2545, 2553 (1979).

In *Yamasaki*, this Court, relying on the "duty to make an accurate determination," the importance of "an assessment of the recipient's credibility" and "the statutory goal that 'there shall be no' recoupment when waiver is appropriate," decided that Congress intended an adjudicatory hearing would be held when a recipient requests a waiver of recoupment of overpayments under the Social Security Act. *Id.* at 2555-56. The Court reached this conclusion even though in the statutory provision in question (42 U.S.C. § 404(b)), Congress did not even mention a hearing.[17]

It is, therefore, clear that when an administrative agency makes decisions which are adjudicatory in nature, the form of procedure required is not to be determined solely from the words (or lack thereof) in the statute. The courts must look to the nature of the decision to be made and the purposes the decision is to serve. This analysis of congressional intent is appropriately conducted within the context of an assumption that Congress intended fair procedures. The Courts of Appeals were correct in applying this analytical approach to Section 402(a) of the Act.

The Administrator also uses the well worn complaint about administrative burdens to suggest that Congress

[17] 42 U.S.C. § 404(b) provides:

> "In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by, the United States from any person who was without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

could not have intended that 5 U.S.C. § 554 would apply to NPDES permit issuances. His case is far from convincing. It is not at all apparent that 5 U.S.C. § 554 and the decision of the Court of Appeals read together require anything significantly different from that which is already required by EPA's regulations governing *both* public participation *and* NPDES permit procedure.[18]

Both 5 U.S.C. § 554 and EPA's regulations contemplate a two-step procedure. Initially, there is "the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment." 5 U.S.C. § 554(c)(1). This requirement appears to fit well within EPA's provision for a "public hearing of the 'legislative' type." Brief for the Petitioner at 8. Next, there is the requirement that "to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title" must be held. 5 U.S.C. § 554(c)(2). EPA's regulations likewise provide for an adjudicatory hearing for persons dissatisfied with the initial decision. Brief for the Petitioner at 9. Therefore, EPA's regulations could be applied in a manner fully consistent with the APA.

The requirement of the Court of Appeals that an adjudicatory hearing must be conducted in this case was *not* based on a conclusion that, contrary to EPA's regulations, an adjudicatory hearing must be conducted in all NPDES permit actions. The court found under "the special circumstances of this case" (586 F.2d at 659) that there were

[18] It is noteworthy that EPA provides no information on the several years' experience with its programs in three circuits which have been requiring hearings. Apparently the program continues to function well.

interested parties who wished to adjudicate material facts upon which EPA's decision rests. The Administrator does not dispute these findings nor has he ever claimed that he was unaware of the interested parties or the issues which concerned them. His only claim has been that the parties did not present themselves and their issues to him in the precise manner he desired. Only this transparent defense was set aside by the Court of Appeals as not being acceptable in light of the requirements of law and regulation and the circumstances of this case.

The real complaint of the Administrator appears to be limited to the requirement by the Court of Appeals that EPA establish some form of record supporting its decision not to provide for any manner of public participation. EPA argues that it could not make this showing without conducting an "APA-type adjudicatory hearing" for every permit. Brief for the Petitioner at 35. Clearly, this claim is no more than a "cry of wolf."[19] Without question, the legislative type hearing can establish the necessary record showing no material issues of fact, no significant public interest, no additional information to be gained, and no doubt as to the propriety of proceeding without a formal hearing. The Court of Appeals expressly stated that with such a showing it would be required to "reconsider our holding that no 'opportunity for a hearing' was provided." 586 F.2d at 659. What is more, in the obviously routine and noncontroversial setting in which most NPDES permits are issued

[19]The Seventh Circuit found that conducting adjudicatory hearings would not be unduly burdensome on EPA. *United States Steel*, 556 F.2d at 834. The court also noted that if EPA's claims of excess burden had merit, the program would have become bogged down regardless of whether the adjudicatory provisions of the APA apply. *Id at* 834 note 14.

(40,000 out of 42,000—Brief for the Petitioner at 34), the likelihood of a challenge is remote and speculative. Therefore, the showing that a hearing was unnecessary could undoubtedly be made by an analysis of the circumstances documented in some informal manner. The Administrator does not explain how, without some showing by EPA, a reviewing court can determine whether EPA met its obligations under the Act, particularly in circumstances such as this case where the regulations require a hearing even if no request is submitted. *See* 40 C.F.R. § 105(c).

The strong emphasis in the Legislative History that Congress intended the NPDES process to be one of full participation, not only by the permittees but also by the interested public, demonstrates that the Act contemplates a burden on EPA to show that it has reasonably sought out the factual information bearing on the permitting action. EPA is not free to act without considering available, pertinent factual information on the excuse that others did not overcome administrative obstacles to urge that information on the Agency in the precise form it desires. EPA is required by the express terms of Section 101(e) of the Act not only to provide for the opportunity for a hearing but also to seek out appropriate input from the public and to encourage and assist those who can make a contribution. Therefore, the real concern raised by EPA's statistics relating to NPDES permit hearings (Brief for the Petitioner at 34) is that under its past practices EPA has granted hearings to fewer than five percent of those who requested them and for less than three-tenths of one percent of the total permits. These statistics as well as the facts of this case show that EPA is making little if any

effort to utilize the Section 402(a) hearing "to make available to the public all relevant information surrounding a discharge source and the control requirements placed upon it" or to provide public participants with "a genuine opportunity to speak on the issue of the protection of its waters." Leg. Hist. at 1490.

The highly inflated and speculative claims of administrative burden by the Administrator lack any credibility. Congress intended that hearings would generally be held to insure that EPA obtained and considered public input—a requirement the Administrator appears to have been ignoring. Since the requirements set forth by the Court of Appeals are consistent with the requirements of the Act, the fault, if any, for the burden of conducting hearings lies with Congress, not with the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court of Appeals properly concluded that under the facts of this case EPA did not provide PLF and Kilroy with the opportunity for public hearing required by Section 402(a) of the Act. The relief ordered by the Court of Appeals is necessary and proper to correct the Administrator's established pattern of ignoring interested and potentially interested public participants and to insure that he will recognize his obligations under the Act to provide for, encourage, and assist genuine public participation in the NPDES permit process. Moreover, the Court of Appeals properly sensed the need not to allow the questionable EPA conduct which precluded any possibility of public participation in this case to occur without a calling

to account. Therefore, Pacific Legal Foundation and John B. Kilroy, Sr., respectfully request that the decision below be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1472

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

vs.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, SR., THE CITY OF TORRANCE, and THE CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Brief for Respondent The City of Los Angeles.

QUESTION PRESENTED.

Respondent The City of Los Angeles ("City" hereinafter) does not accept the "question presented" as stated in the Brief for the Petitioner ("Pet. Br." hereinafter) 2.

First, the petitioner[1] has introduced the question of whether the "public hearing" contemplated by Clean Water Act section 402(a)(1) [33 U.S.C. §1342(a)(1)] is the adjudicatory hearing of the hearing provisions of the Administrative Procedure Act ("APA"

[1]For convenience of expression, petitioner Douglas M. Costle, Administrator of the United States Environmental Protection Agency ("EPA" hereinafter), will be referred to by the name of the agency he heads, the EPA.

hereinafter) [5 U.S.C. §§554, 556, and 557]. The question on which certiorari was granted concerned "adjudicatory hearings," see Petition for a Writ of Certiorari ("Pet. Cert." hereinafter) 2; Appendix ("App." hereinafter) 208, whereas the question presented by the EPA now concerns "APA-type adjudicatory hearings." The applicability of the APA was not addressed in the Petition, but it is dealt with in the EPA's brief on the merits. See Pet. Br. 30-33.

Second, the question as presented will not allow for disposition of the case because it erroneously states certain facts and omits others. The question improperly assumes that "due notice of the proposed action" had been given in the instant case, which assumption is not warranted by a fair reading of the record or the decision below. The court below found that notice had been given the City of the proposed EPA action, Pet. Cert. 6a, but it never held that such notice was adequate. The court went no further than to observe that the "failure of the city to request a hearing *may suggest* that it does not contest any of the facts supporting the issuance of the permit . . . ." (Emphasis added.) Pet. Cert. 19a fn. 3.

Clearly, the adequacy of notice (not only to the City but to the other respondents as well) is an issue that cannot be assumed away by the EPA and necessarily must be before this Court for consideration. Adequacy of notice is an essential element of an "opportunity" for a public hearing.

The question presented also fails to take into account that the decision of the court below was based, in part, upon (a) the EPA's failure to conduct a hearing despite the known opposition to its proposal to use

the Palos Verdes landfill, Pet. Cert. 19a fn. 3, (b) special circumstances resulting from the division of jurisdiction over the Hyperion outfalls, Pet. Cert. 21a-22a, and (c) the absence from the record of any explanation of the June 2, 1977 extension. Pet. Cert. 22a.

INTRODUCTION AND SUMMARY OF ARGUMENT.

The court below remanded the matter to the EPA for a "proper hearing," Pet. Cert. 24a, because the EPA bears the burden of demonstrating that a hearing is unnecessary, that is, that material facts are not in dispute. Pet. Cert. 18a-19a. The EPA argues that it bears no such burden, but rather, maintains that it does all it must do to provide the "opportunity" for hearing by making hearings available on request, as provided by their regulations.

Respondents Pacific Legal Foundation and John B. Kilroy, Sr., in their brief, address themselves primarily to (a) whether "opportunity" is limited to the availability of a hearing on request and (b) whether they were given such an opportunity. The City's brief considers whether the City was afforded such an "opportunity."

The City was not afforded an "opportunity for public hearing" because the notice it received was inadequate. The notice failed to disclose that the proposed EPA action would extend a permit containing a sludge-out compliance schedule which the EPA believed to be in effect despite the subsequent issuance by State authorities of a permit containing a less demanding sludge-out schedule, which permit had not been vetoed by the EPA although it had the power to do so.

The EPA's failure to give adequate notice deprived the City of due process of law under principles long ago laid down by this Court and for the same reason deprived the City of its statutory right to an "opportunity for public hearing".

STATEMENT.

The City accepts the statement of facts and proceedings provided by the EPA, see Pet. Br. 6-17, as corrected and supplemented by the brief filed by respondents Pacific Legal Fundation and John B. Kilroy, Sr. and as set forth herein.

A. The Hyperion Treatment Plant.

The City's Hyperion Treatment Plant treats most of the City's sewage and discharges the treated sewage through three outfalls extending into the Pacific Ocean. All such sewage receives primary treatment; about thirty percent (30%) receives secondary treatment by the activated sludge process. App. 3.

Combined treated effluent (primary and secondary) is discharged through an outfall terminating 26,525 feet (about 5 miles) from shore at a depth of 187 feet. Separated solids are disgested, screened, and diluted (one volume digested sludge with three volumes secondary effluent) prior to discharge through an outfall terminating 35,572 feet (about 7 miles) from shore at a depth of 300 feet at the head of a submarine canyon. App. 3-4. An emergency outfall (to handle increased flow during wet weather and when power fails at the pumping plant) extends 5,364 feet (about 1 mile) to a depth of 50 feet. App. 4.

B. Permitting History of the Hyperion Treatment Plant Outfalls.

Altogether, discharges from the Hyperion outfalls have been regulated by nine[2] discharage permits issued over approximately the past five years. Five such permits were issued by the California Regional Water Quality Control Board, Los Angeles Region ("the Board" hereinafter) acting alone and without rejection of any such issuance by the EPA. Three other permits were issued by the Board and the EPA acting jointly. One such permit, the one in question, was issued by the EPA acting alone.

1. Board Order No. 74-329, EPA NPDES Permit No. CA 0109991.[3]

This permit was the first and was jointly issued on November 18, 1974. It dealt exclusively with the five-mile (treated effluent) and one-mile (emergency) outfalls. The seven-mile sludge outfall was not regulated. The permit contained an expiration date of June 1, 1977. See Pet. Cert. 4a.

2. Board Order No. 75-100, NPDES Permit No. CA 0109991.

This permit was jointly issued on August 18, 1975. App. 3-50. It rescinded the 1974 permit and regulated all three outfalls. It introduced a discharge prohibition

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[2]The EPA counts twelve, presumably by regarding the jointly issued permits as constituting separate permitting actions by the two involved agencies. See Pet. Br. 10 fn. 6.

[3]The EPA has regulated the Hyperion discharges by means of National Pollutant Discharge Elimination System ("NPDES" hereinafter) "permits" where the Board has acted by "orders." Each Board order was given a different number whereas the EPA from the very beginning ascribed the same number to its permits. For convenience, all permitting actions affecting the Hyperion outfalls will be referred to hereinafter as "permits."

of sludge, in accordance with a schedule of compliance. App. 12. The schedule provided for the removal of not less than one-third of the existing discharge in each of three phases. Completion of the phases was scheduled for 18, 24, and 30 months from the "date of concept approval."[4] App. 12, 18.

Much as the 1974 permit, this permit also set specific effluent limitations for the outfalls, App. 6-12, receiving water limitations, App. 13-15, and general requirements. App. 15-17. In addition to sludge, as in the 1974 permit, compliance schedules were established to provide for full secondary treatment.[5] App. 17-18. The permit contained an expiration date of February 1, 1977. App. 21.

3. Board Order No. 75-165.

This permit, issued on December 1, 1975 by the Board alone[6] and without veto by the EPA, recited that 75-100 and the NPDES permit contained a sludge-out schedule "related" to "concept approval", that "con-

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[4]The EPA erroneously states that 75-100 set target dates of April 1, 1977, October 1, 1977, and April, 1978. *Compare* Pet. Br. 11 fn. 7 *with* App. 18.

[5]Pursuant to Clean Water Act section 301(i) [33 U.S.C. §1311(i)], on or about June 9, 1978 the City applied for an extension of the July 1, 1977 secondary treatment deadline established by Clean Water Act section 301(b)(1)(B) [33 U.S.C. §1311(b)(1)(B)]. The City has also applied for a modification (*i.e.*, waiver) of the secondary treatment requirement, pursuant to Clean Water Act section 301(h) [33 U.S.C. §1311(h)]. See note 9 *infra.*

[6]The EPA improperly characterizes orders 75-165, 76-80, 76-202, and 77-29 as affecting "only the state's compliance schedule for the sludge management project." See Pet. Br. 11 fn. 6.

cept approval" was given on October 1, 1975,[7] and that the EPA was "administratively modifying the NPDES permit to substitute definite dates in the time schedule for compliance with the sludge discharge prohibition." App. 51. Based on the stated date of concept approval, this permit supplied the dates for the three phases of the sludge-out schedule which in 75-100 has been keyed to "months from date of concept approval." The dates for completion of the three phases were April 1, 1977, October 1, 1977, and April 1, 1978. App. 53. 75-100 was otherwise left unchanged. App. 52.

4. Board Order No. 76-80.

This permit, issued on May 24, 1976 by the Board alone and without veto by the EPA, changed the sludge-out compliance schedule from three phases of one-third removal each to four phases of one-quarter removal each. The dates given were August 1, 1978, April 1, 1979, October 1, 1979, and April 1, 1980. App. 57. 76-80 found that the City had failed to meet the April 1, 1976 deadline for "completion of approvable plans and specifications for Phases I, II, and III," which made it "highly probable that the City will fail to meet the subsequent completion dates for the remaining tasks described above." App. 55-56.

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[7]Conditional concept approval was given by the California State Water Resources Control Board on such date. See Pet. Cert. 4a-5a. The City does not concede that concept approval was then or at any other time given by the EPA.

5. Board Order No. 76-202.

On November 22, 1976 the Board, acting alone and without veto by the EPA, amended 76-80 to adjust the date for submittal of final plans and specifications necessary to meet Phase I from January 1, 1977 to November 1, 1977. App. 60-61. The City had advised the Board that it would be unable to meet the January 1, 1977 deadline.[8] App. 60. 76-80 was left intact in all other respects. App. 62.

6. Board Order No. 77-1, NPDES Permit No. CA 0109991.

On January 24, 1977 this jointly issued permit expressly found that the Board had adopted 75-165, 76-80, and 76-202 "amending the time schedules contained in Order No. 75-100." App. 93. This permit extended the expiration date of 75-100 from February 1, 1977 to June 30, 1977, 75-100 remaining intact in all other respects. App. 95.

7. Board Order No. 77-29.

This permit was issued on February 28, 1977 by the Board alone and without veto by the EPA. It amended 76-80's sludge-out schedule by modifying a provision relating to trucks (for hauling dewatered sludge). App. 104-107. 76-202 was rescinded. 76-80 was in all other respects left intact. App. 107.

8. Board Order No. 77-84.

On May 23, 1977 this permit was issued by the Board alone and without veto by the EPA. This permit found that 75-100 had been amended by 75-165 and

[8]The EPA pejoratively and unjustifiably refers to the City's inability to meet this deadline as "delays." See Pet. Br. 11 fn. 6.

77-1, made no reference to 76-80 and 76-202, and noted 75-100's expiration date of June 30, 1977. App. 154. It further found that the EPA was "administratively modifying the expiration date of the NPDES permit to extend the permit to the full five-year statutory length as provided in the Federal Water Pollution Control Act and has requested that Order No. 75-100 be extended for the same period." App. 154-155. The permit provided that it was to "serve as part of" an NPDES permit in the absence of objections by the EPA Regional Administrator. App. 155-156. It rescinded 77-1, extended the expiration date of 75-100 to December 17, 1979, and left 75-100 intact in all other respects. App. 156.

The letter advising the City of the Board's proposed action, which became 77-84, stated that the Board "will consider extending the expiration date of Order No. 75-100 (NPDES Permit No. CA 0109991) to December 17, 1979." App. 123.

9. The Action in Question.

By a letter of April 26, 1977 the City was advised of proposed "modifications" to NPDES Permit No. CA 0109991, which modifications became the June 2, 1977 permit extension. App. 115-116. This letter did not describe the proposed modifications but enclosed a copy of the "public notice" relating thereto. App. 115. The public notice's entire description of the proposed modification was that the "Regional Administrator proposes to extend the expiration date of the permit from June 30, 1977 to December 17, 1979. All other terms and conditions of the permit would remain unchanged." App. 118. No further description of the proposed action and no explanation were provided. The

permit referred to was NPDES Permit No. CA 0109991 issued on December 18, 1974, App. 117, the permit which had been expressly rescinded on August 18, 1975. App. 20.

Both the April 26, 1977 letter and the public notice advised the City that comments on the proposed modifications or a request for a public hearing could be submitted within thirty (30) days of the public notice. App. 115, 119. The public notice further advised the City of the availability of a request for an adjudicatory hearing with ten (10) days following receipt of the final determination. App. 120.

By a letter of June 2, 1977 the EPA transmitted a final determination to extend the expiration date of NPDES Permit No. CA 0109991 from June 30, 1977 to December 17, 1979.[9] App. 149. The City did not request either hearing and no hearing was held, despite the existence of a major controversy over

[9]The June 2, 1977 action extended either the 1974 permit or the 1975 permit. By an application dated July 30, 1976, the City had applied for a *new* NPDES permit. See Certified Administrative Record ("AR" hereinafter), documents 3-5, pages 44-118. It was apparently decided that the existing permit should be extended rather than a new one be issued, see AR, document 6, at page 119, and hence the City's 1976 application remains pending. In addition, on or about September 12, 1979 the City applied for a permit which would "modify" (*i.e.*, waive) the secondary treatment requirement, pursuant to Clean Water Act section 301(h) [33 U.S.C. §1311(h)]. EPA regulations implementing section 301(h) provide, and the City's application included, a "signed, completed NPDES application Standard Form A, Parts I, II, and III." 40 C.F.R. §125.58(e)(2) (44 Fed. Reg. 34816, June 15, 1979). Finally, on or about October 1, 1979 the City submitted, as a precautionary measure, separate applications to the EPA and the Board for a joint permit for the Hyperion outfalls.

the Hyperion Treatment Plant Interim Sludge Project.[10]

C. The EPA Enforcement Action.

On August 12, 1977, slightly more than two months after its most recent permitting action and well after the time for requesting a hearing on the June 2, 1977 extension had passed, the EPA caused an action to be filed in federal district court under Clean Water Act section 309 [33 U.S.C. §1319] to enforce the NPDES permit issued on August 18, 1975.[11] App.

[10]The project consisted of trucking dewatered sludge to a landfill in Palos Verdes. A letter of December 9, 1976 from the City to the EPA protested the EPA's decision on November 18, 1976 to fund the project without the preparation and consideration of an environmental impact statement, the City expressing its concern about the environmental impacts of the project. App. 63-72. A letter of November 30, 1976 from the Pacific Legal Foundation to the EPA expressed similar concerns and questioned the legal basis for the EPA's prohibition against the ocean discharge of sludge. App. 84-88.

On April 18, 1977 the EPA, by an affidavit filed with the court in another case, admitted the existence of "the controversy regarding the Hyperion Interim Sludge Project which arose subsequent to the issuance of the Negative Declaration and Environmental Impact Appraisal. . . ." App. 111.

[11]*United States of America v. City of Los Angeles, et al.*, No. CV 77-3047-HP (C.D. Cal.). It should be kept in mind that inasmuch as the instant case began as petitions for review under Clean Water Act section 509(b)(1) [33 U.S.C. §1369(b)(1)], its focus has been upon the adequacy of EPA's administrative record supporting the June 2, 1977 extension. See Rules 15-20 of the Federal Rules of Appellate Procedure. This case has not concerned itself in a major way with the enforceability of the three-phase sludge-out schedule of 75-100. If necessary, that issue will be dealt with in a more substantial fashion in the enforcement action where, unlike this proceeding, the parties can develop a fuller factual record (*e.g.*, though discovery and the cross-examination of witnesses). Proper subjects for detailed consideration in the enforcement action will be the perceptions and intentions of the EPA, Board, and City relative to the various sludge-out schedules.

181-189. The complaint alleged violations of the permit, which included allegations that the City had failed to meet certain deadlines in the three-phase sludge-out compliance schedule. App. 183-189. Civil penalties were sought as well as a mandatory injunction to impose the four-phase sludge-out schedule contained in 76-80, although no express reference was made to 76-80. App. 187-189. The complaint made no express reference to any Board action, although the permit it sought to enforce, which was attached as an exhibit, was a jointly issued permit. In enforcing the three-phase sludge-out schedule of 75-100, the EPA relied upon an alleged granting of "concept approval" (which would trigger the schedule) by the California State Water Resources Control Board. App. 184.

ARGUMENT.

THE CITY WAS DENIED AN "OPPORTUNITY FOR PUBLIC HEARING".

The City was not afforded the "opportunity for public hearing" mandated by Clean Water Act section 402(a)(1) [33 U.S.C. §1342(a)(1)] on the June 2, 1977 permit extension because it was not given adequate notice of the proposed action. The notice was inadequate because it failed to inform the City that the EPA regarded the three-phase sludge-out schedule of 75-100 to be in effect despite the Board's subsequent issuance of 76-80, which contained a more lenient four-phase schedule.

I.

The Notice Was Inadequate.

The permitting history of the Hyperion Plant is one of confusion and uncertainty. By issuing permits for the Hyperion outfalls, both the EPA and the Board were claiming at least some degree of jurisdiction over them although the nature and extent of each agency's jurisdiction was unclear. This jurisdictional uncertainty was not finally resolved until the decision below. While acting in concert in issuing the first two permits jointly, on December 1, 1975 the Board began the practice of occasionally, but not always, acting alone—a practice of the EPA tolerated by its nonexercise of its veto right under Clean Water Act section 402(d)(2) [33 U.S.C. §1342(d)(2)]. Although the EPA never vetoed any of the Board's actions, it nonetheless regarded itself free, when it filed its enforcement action, to adopt after the fact those State actions which served its purposes. Thus, on the one hand, in its complaint filed in the enforcement action the EPA alleged that

the State had given "concept approval" on October 1, 1975, so as to trigger the three-phase sludge-out schedule of 75-100. Yet, on the other hand, in the same complaint it chose to ignore entirely any of the Board's actions, most significantly 76-80, which had changed 75-100's three-phase sludge-out schedule to a four-phase schedule extending the date for total sludge-out by two years.

The court below noted that the record is "barren of any explanation of the extension of June 2, 1977." Pet. Cert. 22a. If its purpose was to restore the three-phase sludge-out schedule of 75-100, the notices sent to the City did not make this clear. The only message conveyed by the notices from both the EPA and the Board was that NPDES Permit No. CA 0109991 and 75-100 would be extended to December 17, 1979. Considering that the City had been given reason to believe that the four-phase schedule and the April 1, 1980 date for complete sludge-out would be in effect, see App. 64, adequate notices would have made clear that the EPA intended to revivify[12] the three-phase sludge-out schedule of 75-100.

II.

Inadequate Notice Is a Legal Infirmity.

In failing to give the City adequate notice of its intended action, it denied the City due process of law[13] and an "opportunity for public hearing" within

[12]In point of fact, this was impossible. By June 2, 1977 the City was already substantially behind the target dates set forth in 75-100 as modified by 75-165.

[13]This Court has apparently not ruled on the question of whether a municipal corporation, such as the City, is a "person" for purposes of the Fifth Amendment's Due Process Clause. The Court has ruled, on the one hand, that a state

the meaning of Clean Water Act section 402(a)(1) [33 U.S.C. §1342(a)(1)]. This Court has long held that adequate notice is an essential element of due process. Thus it was stated, in *Baldwin v. Hale,* 68 U.S. (1 Wall.) 223, 233, 17 L.Ed. 531 (1864), that "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." In *Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914), it was stated that the "fundamental requisite of due process of law is the opportunity to be heard."

More recently, in the familiar case of *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), which concerned the adequacy of the *form* of notice given, the Court articulated the fundamental relationship of notice to a fair hearing:

is not a "person" under the Clause, *South Carolina v. Katzenbach,* 383 U.S. 301, 323-324, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), while, on the other hand, it has found the private corporation to be a "person" protected by the Fourteenth Amendment's Equal Protection Clause. *Pembina Con. Silver Mining etc., Co. v. Pennsylvania,* 125 U.S. 181, 188-189, 8 S.Ct. 737, 31 L.Ed. 650 (1888). The court below in another case has opined that a municipal corporation could be protected by the Due Process Clause. *City of Santa Clara, Cal. v. Andrus,* 572 F.2d 660, 675 (9th Cir. 1978) (dictum), *cert. denied,* ..... U.S. ....., 99 S.Ct. 176-177, ... L.Ed.2d ..... (1978); *but see, Lewis v. Richardson,* 428 F.Supp. 1164, 1167 fn. 3 (D. Mass. 1977) (equal protection); *but cf., Riley v. Stack,* 128 Cal.App. 480, 18 P.2d 110, 111 (1932) (county not a "person" under Fourteenth Amendment Due Process Clause).

The substantial regulation of municipalities by the Federal Government, such as pursuant to the Clean Water Act, militates in favor of affording municipalities protection of the Clause. They are treated much in the same fashion as other "persons." In any event, the Court need not rule on this question here because the protections afforded by the Due Process Clause surely inhere in the statutory language "opportunity for public hearing" of Clean Water Act section 402(a)(1) [33 U.S.C. §1342(a)(1)].

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313.

"The right to be heard has little validity or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*

"The notice must be of such nature as reasonably to convey the required information. . . ." *Id.*

The importance of the *content* of notice was recently indicated by the Court in *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). The Court there held that due process required a municipal utility to notify its customers of the availability of an avenue of redress should they wish to contest charges on their bills. The Court found that the notice given in that case was not "reasonably calculated" to provide customers with that information. *Id.*, at 14.

The notice given to the City in the instant case failed to disclose that the EPA regarded the three-

phase sludge-out schedule of 75-100 to be in effect, the more recently issued four-phase schedule of 76-80 notwithstanding. And sludge, it should be noted, was the focus of disagreement between the City and the EPA. See, *e.g.*, App. 63-72, 202. Adequate notice of the EPA's intentions regarding sludge may very well have induced the City to request a hearing on the proposed extension. Clearly a hearing would have disclosed the EPA's intentions.[14]

III.
National Land Operators' Association v. Kleppe Is Distinguishable on the Notice Issue.

The inadequacy of the notice given the City distinguishes the instant case from *National Land Operators' Association v. Kleppe*, 423 U.S. 388, 96 S.Ct. 809, 46 L.Ed.2d 580 (1976), a case relied upon by the EPA. That case concerned section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742 [30 U.S.C. §§801 *et seq.*], which empowers the Secretary of the Interior to assess civil penalties for health and safety standard violations only after operators charged with such violations have been

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[14]A hearing would have also fostered coordination between the EPA and the Board in its dealings with the City. The Court below noted:

"Among the special circumstances of this case is the division of jurisdiction over discharges in the ocean between the federal and state authorities which *significantly complicates compliance by an affected agency*. It becomes both possible and tempting for each authority to *deny responsibility by attributing the command in question to the other*. The ease with which this can be done increases as the opportunities for confrontation in a hearing setting diminish. Considerations such as these may properly influence our decision about whether a hearing in the situation before us would be useless." (Emphasis added.) Pet. Cert. 21a-22a.

given an "opportunity for a public hearing." The regulations challenged in that case provided for the issuance of proposed orders containing penalty assessments. *Id.*, at 394.

The message conveyed by a notice that an agency proposes to assess a penalty is far different from that conveyed in the instant case. The issuance of an NPDES permit is a licensing action of great complexity. One need only briefly consider the detailed effluent limitations, receiving water limitations, compliance schedules, and other technical requirements (not to mention the legal framework they presumably implement), see 75-100, for example, App. 3 *et seq.*, to understand the problems faced by a discharger in comprehending what the EPA intends to do. Conversely, notice of a penalty assessment conveys a message that is not lost on its recipient. Even if the reasons for the proposed penalty are obscure, the agency's intended action is unmistakably clear. This very distinction, in substance, was articulated by the court below. Pet. Cert. 19a fn. 3.[15]

As a consequence, even if this Court were to agree with the EPA that the "opportunity for public hearing" requires only that such a hearing be made available upon request, the failure of the EPA to give the City adequate notice constituted a denial of any meaningful "opportunity" to request a hearing.

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[15]The court below did not find the EPA's notice to the City to be adequate. It went no further than to observe that "the failure of the city to request a hearing *may suggest* that it does not contest any of the facts supporting the issuance of the permit. . . ." (Emphasis added.) Pet. Cert. 19a fn. 3.

CONCLUSION.

For the foregoing reasons, the City respectfully requests that the decision below be affirmed.

Respectfully submitted,

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FOR ARGUMENT.

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No. 78-1472

In the Supreme Court of the United States

OCTOBER TERM, 1979

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The court of appeals held that, under Section 402(a) of the Clean Water Act, 33 U.S.C. 1342(a), EPA may not issue, deny, or extend an NPDES permit without first holding an adjudicatory hearing complying with 5 U.S.C. 554-556 and 557 and that EPA must hold such hearings even where, as here, no request for such a hearing presenting a material issue of fact is submitted to the agency (Pet. App. 16a-19a). The only exception to this sweeping rule arises where EPA can demonstrate on judicial review that its action is based on facts about which no plausible dispute exists so that an adjudicatory hearing would have served "absolutely no purpose" (*id.* at 19a-20a).

This holding invalidated EPA's regulations *sub silentio* inasmuch as those regulations call for denial of an "adjudicatory" hearing unless a requestor makes a threshold showing that there are material factual issues

to be adjudicated. 40 C.F.R. 125.36(b); Pet. Br. 3-4. In our view, however, the agency correctly construed the statutory "opportunity" for a hearing, which Section 402(a) provides, as not requiring that a hearing be held prior to every NPDES action taken by EPA. Rather, we submit, the agency may condition the availability of the hearing upon a request, *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 397-398 (1976), and may impose a threshold requirement that a material issue of fact be tendered for resolution in a timely manner. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973).

1. Respondent PLF and Kilroy ("PLF") argue that EPA erred in not conducting at least a public, legislative-type hearing. Thus, PLF argues that " 'significant public interest' existed in this particular permitting action" (PLF Br. 24), that EPA itself knew its action was "controversi[al]" (*ibid.*), that EPA's newspaper announcement was insufficient notice to the public (*id.* at 26-28), that EPA violated its regulations requiring a public, legislative-type hearing where there is " 'significant public interest' " (*id.* at 3-4, 23), that EPA failed to provide the public with " 'a genuine opportunity to speak on the issue of protection of its waters' " as called for by the legislative history (*id.* at 20), and that all the court of appeals really felt was missing was a record justifying the decision of the Administrator not to hold a public, legislative-type hearing (*id.* at 38). The short and dispositive answer to all of these arguments is that, although EPA did not conduct a public, legislative-type hearing, the court below set aside EPA's action—not for failure to hold a public, legislative-type hearing—but for

failure to hold an adjudicatory hearing.[1] Any error in failing to conduct a public, legislative-type hearing cannot justify the court of appeals' vacation of EPA's action for failure to hold an adjudicatory hearing.[2]

---

[1]If PLF desired review of the failure of the court of appeals to order EPA to hold a public hearing, it should have filed a cross-petition for certiorari. Its failure to do so bars its attempts to raise the issue now. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226 n. 2 (1975); *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 431 (1941).

[2]In any event, EPA did not err in not holding a public, legislative-type hearing. Such a hearing had already been held in 1975 (A. 6) where the public, including all respondents, had ample opportunity to be heard. A public hearing was also held on the January 24, 1977 extension (A. 94). Notice was published and given to the City of the permit extension (A. 113-120, 126), yet no request for a public, legislative-type hearing was made. Moreover, the so-called "sludge-out" requirement, to which PLF objects, is a statutory imperative. It could not have been deleted no matter how vehemently it might have been attacked at a public hearing (see pages 6-7, *infra*). In these circumstances, it was not unreasonable to conclude that there was insufficient public interest in the permit extension to justify a further public, legislative-type hearing. 40 C.F.R. 125.34.

To be sure, the Regional Administrator stated in separate litigation brought by PLF that EPA would voluntarily prepare an environmental impact statement concerning EPA's decision to provide financial assistance to the City's Interim Sludge Disposal Project in light of the "controversy" that had arisen over that project (A. 108-111). That controversy, though related to the sludge-out requirement in the permit, is a separate matter. As required by the Section 301(b)(1)(B), 33 U.S.C 1311(b)(1)(B), and the pertinent effluent limitations, the permit merely prohibits the discharge into the ocean of sludge after certain dates (A. 12, 18). The permit does not dictate any particular alternative method for disposal of the sludge. In its Interim Sludge Disposal Project, the City chose to dispose of the sludge in a landfill until a more permanent solution is made operational (A. 5, 109). That choice was opposed by PLF, Kilroy and others on the theory that it would "involve transporting millions of tons of sludge through the streets of Los Angeles in huge trucks for disposal in landfills near residential neighborhoods" (PLF Br. 6). The "controversy" referred to by the Regional Administrator in his affidavit in the separate litigation (A. 111) concerned only the particular method of sludge disposal selected by the City. PLF itself recognizes this distinction (see A. 133).

2. Neither PLF nor Los Angeles defends the sweeping holding below that requires, except in extraordinary circumstances, automatic adjudicatory hearings before all EPA denials, issuances or extensions of NPDES permits. Neither respondent directly challenges our basic point that an adjudicatory hearing may be conditioned on filing a request presenting material issues of fact. Both, however, advance narrower arguments that, on the facts of this case, a remand for an adjudicatory hearing was proper.

a. PLF contends (Br. 10, 14, 31) that EPA did not provide PLF with prompt and sufficient notice of its proposed and final action and, therefore, PLF's failure to frame a material factual issue should be excused. There are, however, several flaws in that argument. First, PLF in fact filed a request for a hearing on its objections to EPA's action which was treated as timely by EPA (A. 159-163). Well before it filed the request, PLF was intimately familiar with the NPDES permit, its sludge-out schedule, the City's Interim Sludge Disposal Project, and its alleged environmental and social consequences (A. 84-88, 131-147). When PLF filed its hearing request, it knew the sludge-out schedule had been carried forward without change (A. 160). Therefore, nothing prevented PLF, when it filed its request, from framing any factual issue it desired concerning "the adverse impacts on people, fish, and wildlife" which PLF says are "certain to result" from the implementation of the sludge-out schedule (PLF Br. 6).

Second, the record makes its abundantly clear that PLF intentionally chose to present only legal objections to the extension of the permit. In its brief to EPA's General Counsel, PLF stated (A. 173-174; emphasis added):

> The issues of law certified to the General Counsel by the Environmental Protection Agency (EPA) Regional Administrator of Region IX are not an accurate reflection of the issues which would have been raised at the adjudicatory hearing requested pursuant to 40 C.F.R. § 125.36. *Requestor of the adjudicatory hearing, John B. Kilroy, proposed to raise two basic issues*:
>
> 1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and
>
> 2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water Pollution Control Act (FWPCA, 33 U.S.C. §§ 1281, *et seq.*).

These are legal, not factual, issues. The Regional Administrator's letter to PLF had advised that EPA had concluded that "the request does not set forth material issues of fact * * * [but] does * * * present issues of law * * *" (A. 166). If PLF truly believed the certification of issues was in error because it omitted factual issues, PLF

would have said so in its brief to General Counsel. Instead, PLF confirmed that it posed only legal objections to the extension of the permit. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).[3]

Third, even now PLF tenders no material factual issue requiring an adjudicatory hearing. PLF states (Br. 6) that the purpose of any hearing should be "to present to EPA, on a public record, information and arguments relating to adverse impacts on people, fish, and wildlife which are certain to result from the implementation of EPA requirements for modifying the processing of wastewater at Hyperion." PLF wishes to demonstrate "significant adverse environmental and social effects" of

[3]For the same reasons, PLF's argument is not improved by its claim (Br. 31 n.13) that EPA violated 40 C.F.R. 125.35(b)(1) by not sending PLF a copy of the June 2, 1977, order extending the permit. In any event, PLF misconstrues Section 125.35(b)(1). That provision only requires that EPA send copies of permits to persons who comment on proposed pending permits or extensions. PLF's letter of December 30, 1976 (A. 84-88), was not a comment on the proposed extension from June 30, 1977, to December 17, 1979. Rather, it was a request that EPA suspend the sludge-out schedule altogether and allow sludge discharge except insofar as the marine environment was demonstrably harmed. This letter was evidently intended as a comment on a federal funding of the City's Interim Sludge Disposal Project (see A. 63-83)). But even if it was intended as a comment on EPA's then-pending proposal to extend the permit, Section 125.35(b)(1), at most, required EPA to send to PLF a copy of the January 1977 order extending the permit through June 30, 1977 (A. 96-101). PLF does not contend that it failed to receive a copy of that order. PLF's contention that the January 1977 order was merely an interim order and that the June 1977 order was the "final action" on the extension pending when PLF wrote its letter ignores the fact that after the January order, EPA issued in April 1977 a new notice of proposed action extending the permit, which EPA regarded as a fresh proposal. In any event, PLF knew when it filed its request for a hearing that the compliance schedule had not been altered. For the reasons set forth in the text, PLF was thus not prejudiced by any failure to receive the June 1977 order.

the use of landfills to dispose of sludge (Br. at 7). However, even if PLF had made a timely request for an adjudicatory hearing on such matters, it would have properly been denied as not material. The permit did not dictate or even address the alternatives available to the City for the disposal of sludge. The City chose (in its Interim Sludge Disposal Project) to dispose of the sludge at a landfill pending a more permanent solution. Although the City might have selected a different interim solution with different consequences, the alternative of continuing to discharge sludge into the ocean was and is barred by Section 301(b)(1)(B) and the regulations thereunder.

As explained by the Regional Administrator to PLF (A.89-91), Section 301(b)(1)(B) then absolutely required (and still requires) all publicly-owned treatment works to meet "effluent limitations based upon secondary treatment" set by the Administrator no later than July 1, 1977. Those limitations prohibit the discharge of sludge (except in minimal amounts). See, *e.g.*., 40 C.F.R. 133.102.[4] Therefore, even if the sludge-out schedule, by requiring the City to find an alternative method of disposal, indirectly imposes countervailing environmental and social consequences, those consequences are inadmissible as a matter of law in an NPDES proceeding, for EPA has already determined (in Section 301 limitations

[4]The limitations do not expressly refer to sludge but to its component parts. Sludge is the solid residue left over after primary and secondary treatment (A. 3-4, 12, 137).

issued in 1973 no longer to timely challenge) that such discharges must be stopped.[5]

b. The City of Los Angeles (Br. 13-16) contends that EPA failed to provide it with sufficient notice that the sludge-out schedule EPA intended to carry forward was the EPA schedule rather than the state schedule. Had the notice to the City specified the sludge-out schedule at issue, the City contends it "may very well have" requested a hearing (*id.* at 17). The City, however, does not contend it actually believed that the NPDES permit would be governed by the state's more generous timetable.

In any event, the City had no basis for such a belief. The City knew or should have known that an NPDES permit was required for each outfall and that EPA had exclusive jurisdiction under the Act to issue NPDES

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[5]To be sure, EPA's sludge-out schedule, in realistic recognition that Los Angeles would be unable to comply with these effluent limitations by July 1, 1977, and, in an effort to bring about as prompt compliance as possible, provided a schedule that extended to April 1978. Insofar as the permit purported to authorize noncompliance after July 1, 1977, the permit was unauthorized. At the time of the Regional Administrator's action, EPA had not yet fashioned a policy for dealing with permits to facilities which would be unable to comply with the statutory deadline. Since the 1975 permit was issued, EPA has adopted a policy of not issuing permits authorizing noncomplying discharges after the statutory deadline. In some cases, however, EPA will advise a discharger unable to meet the deadline that EPA does not intend to bring an enforcement action so long as the discharger adheres to a fixed compliance schedule. See generally *Bethlehem Steel Corp.* v. *Train*, 544 F. 2d 657 (3d Cir. 1976); cf. Sections 301(i) and 309(a)(3)(B) of the Clean Water Act, 33 U.S.C. (Supp. I) 1311(i) and 1319(a)(3)(B); *A Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess. 861-862 (Comm. Print 1978). In any event, this discrepancy does not improve PLF's argument, for PLF would eliminate the sludge-out requirement altogether (see A. 88).

permits for the five- and seven-mile outfalls, as the court of appeals held (Pet. App. 14a-16a). Although the State purports to regulate all three outfalls under its Porter-Cologne Act (see *id.* at 15a), any state compliance schedule under local law could not have affected the requirements of the NPDES permit.[6] No modification of the sludge-out schedule in EPA's 1975 permit could have been made without providing advance notice to Los Angeles and the public that such a modification was proposed. The City points to no EPA notice proposing at any time to modify the federal sludge-out schedule in the 1975 permit. In any event, the City still offers no material factual issue it wishes to have resolved at any evidentiary hearing.[7]

3. The Ninth Circuit based its holding in part on a "strong policy in favor of holding [formal] public hearings before an adjudicative decision is made" (Pet. App. 20a), and its view that a Section 402 hearing must in all cases conform to the trial-type procedures of 5 U.S.C. 554, 556 and 557. This was error. A Section 402

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[6]The obvious reason that EPA did not veto the State's permits for the five-and seven-mile outfalls is that these permits were not NPDES permits but were issued only under California's Porter-Cologne Act. A state-administered NPDES program may displace federal jurisdiction only for navigable waters within three miles of the coastline (see Pet. App. 14a-16a). Thus, although the state properly issued an NPDES permit for the one-mile outfall (through which sludge is not pumped (see A. 4)), the State's permits for the five-and seven-mile outfalls were purely local permits not subject to federal veto.

[7]The state modification permits relied on by the City, moreover, did not purport to modify the federal permit (A-51, 56, 61, 105-107, 155-156). To the contrary, orders 75-165 and 77-84 recognized that EPA would have to modify the NPDES permit (A. 51, 154). The joint actions distinguish between the state and federal permits and do not purport to modify the federal sludge-out schedule (A. 93-95).

hearing need not in all cases be an adjudicatory hearing. Even where an adjudicatory hearing is indicated, moreover, it is not an "on-the-record" hearing and is thus not governed by 5 U.S.C. 554, 556 and 557. Instead, EPA may provide an adjudicatory hearing or a public, legislative-type hearing, depending on the circumstances, and may do so without regard to the APA. See our opening brief at 29-35.[8]

Although Congress could have instructed the agency to follow 5 U.S.C. 554, 556 and 557, we think the better view of the legislative history is that it did not. Congress omitted the phrase "on the record." The weight of the legislative history demonstrates that Congress did not intend to impose the requirements of 5 U.S.C. 554, 556 and 557 in those instances where EPA permits an adjudicatory hearing. PLF stresses three contrary arguments.

First, PLF contends (Br. 34-35) that where judicial review specifically provided by statute, as here, can only be effective on an administrative record, it must be presumed that Congress intended Sections 554, 556 and 557 to apply. There is no such presumption however. *Califano* v. *Yamasaki*, No. 77-1511 (June 20, 1979), establishes no such presumption and hardly held that the only fair procedure for administrative adjudications is 5 U.S.C. 554, 556 and 557. Indeed, *Yamasaki* does not even mention those provisions. *Yamasaki* illustrates our point that fair adjudicatory procedures can be tailored to the needs of the agency and litigants without following the specific formal procedures of the APA. Moreover,

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[8]Indeed, EPA's procedures place primary reliance on the less formal notice-and-comment procedures and, where significant public interest exists, an informal public hearing. Only for the rare factual issue that remains after these procedures is a trial-type hearing available.

EPA's adjudicatory procedure provides a record sufficient for judicial review. Where it does not, the complete remedy is a remand to the agency for a more complete record. *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

Second, PLF contends that the statutory goal of public participation in NPDES proceedings can best be achieved by requiring APA-type adjudicatory hearings in all instances. EPA's flexible hearing regulations, however, will achieve far greater public participation than would PLF's scheme. By its nature, an adjudicatory hearing meeting the requirements of 5 U.S.C. 554, 556, and 557 is a closed process, not an open one.[9] The "general public" can hardly afford to pay counsel which are necessary to participate in evidentiary proceedings. Because of the trial-like nature of adjudicatory hearings, a member of the public wishing to present views must become a party to formal proceedings, must attend prehearing conferences, and must agree to submit to cross-examination before an administrative law judge in order to have his views considered. This is hardly a "wide open means for communicating with the public at large" (PLF Br.22).[10] In contrast, EPA's provision of a public, legislative-type hearing (where there is sufficient public interest in a proposed action) is far more suited to encouraging public participation.

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[9]Thus, Professor Davis distinguishes a statute requiring a "hearing" from those requiring a "public hearing" by pointing out that the latter, "when many are affected, usually means a speech-making hearing rather than a hearing with a determination on the record." 2 K. Davis, *Administrative Law Treatise* § 12:7, at 434 (2d ed. 1979).

[10]Where the threshold requirements of an adjudicatory hearing are met under EPA's regulations, the type of hearing provided fully complies with 5 U.S.C. 554, 556 and 557. No court has held to the contrary. Nonetheless, our primary submission on this issue is that Section 402 proceedings are not "on-the-record" proceedings for purposes of the APA.

Finally, PLF challenges our use of the legislative history of Section 311(b)(6), 33 U.S.C. 1321(b)(6). As we noted (Pet. Br. 31-32 n.20), the committee stated that the phrase "notice and opportunity for a hearing" was "not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record * * *." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 804 (Comm. Print 1973). PLF contends that the committee nevertheless indicated its intent to impose adjudicatory hearings in the third sentence, which noted that "[p]rovisions of title 5 of the United States Code commonly referred to as the Administrative Procedure Act, as amended, will nevertheless apply to assure due process and protection of a respondent's right." *Ibid.* PLF omits from its quotation the fourth sentence in the paragraph, which explains what provisions of Title 5 were referred to: "In that regard, the respondent has the opportunity of a de novo hearing in any collection proceeding initiated by a United States Attorney after the conclusion of administrative procedures." *Id.* at 804-805. This language indicates that even if Congress though formal hearings were appropriate under Section 311(b)(6), it intended the forum for those hearings to be de novo review in the district court (see 5 U.S.C. 706(2)(F)), and likewise intended the agency hearings to be informal.[11]

[11]The entire paragraph reads as follows (Leg. Hist. 804-805):

> The language "notice and opportunity for a hearing" of Section 311(b)(6) is not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record before a hearing examiner such as are used for ratemaking and similar federal rule issuance. The committee believes that effective administrative enforcement will be enhanced by assessment procedures which are expeditious. Provisions of title 5 of the United States Code commonly referred to as the Administrative Procedure Act, as amended, will nevertheless apply to assure due process and protection of a respondent's rights. In that regard, the respondent has the opportunity of a de novo hearing in any collection proceeding initiated by a United States Attorney after the conclusion of administrative procedures. The net result is to parallel the penalty assessment method which the Coast Guard has used in the past in connection with laws which it administers.

The Committee may also have meant to refer to 5 U.S.C. 555(e) and 558(c). See Pet. Br. 31-32 n.20.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

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